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No.

In the

Supreme Court of the United States

MATTHEW MILSTEAD,
ADMINISTRATOR OF THE
ESTATE OF MARK MILSTEAD

Petitioner,

versus

CHAD KIBLER, SCOTT PROCTOR
AND LESTER WHETZEL,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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Questions Presented for Review

1. In applying the Fourth Amendment's totality of circumstances test on summary judgment to the use of deadly force by the police to kill an innocent person, what circumstances may be excluded from consideration as a matter of law?

1(a). To what extent should police actions precipitating the alleged need to use deadly force be ignored?

1(b). To what extent should the actions and knowledge of jointly acting police officers at the scene be ignored?

2. In applying the Fourth Amendment's totality of circumstances test on summary judgment to the use of deadly force by the police to kill an innocent person, is a court permitted to accept the shooting officer's testimony as to his subjective perceptions of the circumstances, where other evidence is inconsistent with the officer's claimed perceptions?

3. In civil actions against individual officers based upon the use of excessive force, is there any distinction between the standards of the Fourth Amendment and the standards of qualified immunity doctrine?

4. Are civil actions against individual officers based upon the use of excessive force governed by different standards of summary judgment than other cases?

List of Parties

All of the parties to the proceeding below are named in the caption.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2000

No. 00-

MATTHEW MILSTEAD,
ADMINISTRATOR OF THE ESTATE OF MARK MILSTEAD,

Petitioner,

v.

CHAD KIBLER, SCOTT PROCTOR, AND LESTER WHETZEL,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petitioner respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit.

Opinions Below

The opinion of the court of appeals upon the rendering of its judgment (1a-13a)[1] is reported at 243 F.3d 157 (4th Cir. 2001). The district court's opinion on the judgment appealed from (14a-30a) is reported at 91 F. Supp. 2d 895 (W.D. Va. 2000). A relevant prior opinion of the district court in denying the defendant-respondents' initial motion to dismiss (31a-41a) is not reported in the Federal Supplement, but is available online at 1999 Westlaw 370072 and (W.D. Va. 1999).

Jurisdiction

The judgment of the court of appeals was entered with the issuance of its opinion on March 15, 2001 (1a). An order denying rehearing was entered on April 10, 2001 (42a). This Court has jurisdiction under 28 U.S.C. § 1254(1).

Constitutional and Statutory Provisions Involved

The case involves the Fourth, Seventh, and Fourteenth Amendments to the United States Constitution, 42 U.S.C. § 1983, and Fed. R. Civ. P. 56, which are set out in pertinent part in the appendix to this Petition.

Statement of the Case

As aptly characterized by the court of appeals' opinion below, the facts of this case "sound a tragic knell of classical proportions," 243 F.3d at 165 (12a). The facts here were the actualization of a private citizen's worst nightmare: a midnight attack on one's home by an armed and murderous intruder; a call for help to the authorities eventuating in grossly inept intervention by police officers that made a bad situation worse, and ultimately resulted in panicked police officers killing the innocent victim rather than subduing the

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[1] Citations to "-a" are to pages of the appendix to this petition. Citations to "JA-" are to pages of the Joint Appendix in the court of appeals.

criminal intruder, who had been held at bay by the victim until the police arrived. In the end, the episode resulted in three dead citizens and three live, uninjured police officers who were the only surviving eyewitnesses to the events. There is no doubt that the victim here, Petitioner's decedent Mark Milstead, would have been better off if his call to 911 had received no answer, which is sad commentary on the state of public protection in his community.

But the greater failure in this case may be that of the legal system itself, which is what justifies review by this Court. Through a series of decisions grappling with alternating and somewhat inconsistent applications of constitutional law and qualified immunity doctrine, the lower courts now have pronounced themselves impotent even to bring this case to a full adjudication by a trial on the merits, or even to consider the full range of circumstances that produced these tragic results. And those decisions reflect a still broader pathology in the lower federal courts' approaches to cases of unjustified use of deadly force by the police against the innocent.

Statement of Facts

On the night of October 25-26, 1996, Mark Milstead and his fiancé, Jill Cardwell, were at home together at Milstead's house in Shenandoah County, Virginia, located in a residential area a few miles from the County seat of Woodstock. At about midnight, an armed intruder named Steven Ramey[2] broke into their home, and murdered Ms. Cardwell in her bed, by a single gunshot to the back of her head.[3] Apparently, Milstead had been able to retrieve his own pistol, and engaged Ramey first in a gun battle and then in hand-to-hand combat. Both men suffered non-fatal

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[2] Ramey apparently was an ex-boyfriend of Ms. Cardwell.

[3] See the autopsy report on Ms. Cardwell (JA465-74).

gunshot wounds and other injuries in the course of that combat. By 12:14 A.M., Milstead had driven Ramey from the house, and placed a 911 call to request help. While Milstead was on the phone with the 911 operator, Ramey broke in again and resumed shooting at Milstead. At that point, Milstead dropped the telephone handset. The telephone line remained open, and sounds from the remainder of the episode, including the later shooting of Milstead by the police, were recorded on the 911 audiotape, which was made a part of the record in the case.[4]

Three officers were dispatched in response to the call– Chad Kibler, Scott Proctor, and Lester Whetzel. The officers arrived at Milstead's house about 12 minutes after the 911 call was placed. Upon arrival, the officers heard Milstead's calls for help from inside the house. Whetzel remained outside, at one corner of the house, while Proctor and Kibler both entered the house by breaking open the main entrance door, with Proctor leading and Kibler following. Inside the house, Proctor and Kibler both saw Milstead and Ramey wrestling on the floor of the main room on the other side of the entrance door. At that point, Milstead had obtained the superior position by wrestling Ramey to the floor. The officers entered with their guns drawn and pointed in front of them, shouting "police!" Milstead then moved out of the line of fire, and warned the officers that Ramey was armed. According to Proctor's statement on the incident:

> "[W]hen I kicked the door in the guy said, the good guy who was on top at the time, fell back and said, 'He's got a gun'. And of course my weapon was drawed. I was probably less than ten feet from what I believe was the bad guy and it looked like he come up with a weapon."

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[4] The Virginia State Police also prepared a transcript of key portions of the tape, reproduced at JA601-07.

(JA526).[5] Milstead and Ramey did not resemble each other physically, and they were dressed entirely differently: Milstead was not wearing a shirt or shoes, as he apparently had been roused from his bed by the attacked, whereas Ramey was fully clothed, including a jacket. Proctor had no difficulty in distinguishing between them. After perceiving Ramey with a weapon, Proctor fired four shots at Ramey at the distance of 10-12 feet, missing all four times. His fire was not returned by Ramey, who then apparently was out of ammunition.

Simultaneously with Proctor's fire at Ramey, both Proctor and Kibler began retreating back out of the door by which they had entered, and continued to retreat outside to opposite corners of the house. Proctor ended up at the corner farthest from the door, where Whetzel had been positioned since the officers' arrival. Kibler took cover around the opposite corner of the house, which had a direct view of the door, and pointed his weapon at the door.

In the meantime, Milstead had been left inside the house with the now-released Ramey. About 20 seconds after the officers' retreat, Milstead shouted that Ramey was "getting more ammo," Ramey shouted "where you at,"[6] and Milstead attempted to follow the same path of retreat that the officers had taken. Immediately upon emerging from the door of his house, Milstead was shot twice by Kibler, who had been lying in wait around the corner of the house, with his gun pointed at the door. After falling to the deck in front of his door, Milstead looked at Kibler and said "he's still inside" (JA187-88). Kibler then went and told the other two

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[5] Unlike the case of Kibler, Proctor's later deposition testimony (JA252-57) was consistent with this early statement.

[6] See JA607.

officers that he had shot the "good guy," to which the other officers responded "how do you know" (JA189-90, 202, 268-69, 312).

In any case, the wounded Milstead was left on the deck unattended for approximately 20-30 minutes after he had been shot. The officers' ex post rationale for that lack of attention was their fear that the area was not "secure" and that "there still might be a threat" (JA190-91, 279-80)– apparently meaning Ramey. However, within 15 seconds after the two shots that hit Milstead, another shot is heard on the 911 tape (JA607). This was apparently the fatal gunshot wound that killed Ramey.[7] Assuming that the officers did not kill Ramey, this wound would have to be self-inflicted, because no one else was left alive at the scene. There were no bystanders, and no nearby houses, as this was a low-density residential area.

Although Milstead had been shot at approximately 12:28 A.M., he remained on the deck unattended until nearly 1:00 A.M., and did not reach the hospital until 1:45 A.M. He died approximately one hour later. The post-mortem examination of Milstead disclosed three gunshot wounds: (1) a neck wound apparently inflicted by Ramey; (2) a graze wound to the right chest continuing with an entrance wound to the inside of the upper right arm, apparently inflicted by Kibler; and (3) a penetrating wound to the upper left chest, apparently inflicted by Kibler, which was the fatal wound. (JA477-79, 482). For both of the shots fired by Kibler, the wound tracks move from left to right, thus indicating that Milstead was shot from the left side, and was not facing toward Kibler when he was shot by Kibler.

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[7] According to the post-mortem examination, the cause of Ramey's death was a single gunshot to the head, inflicted at close range, though Ramey also had six other non-fatal gunshot wounds (JA 487, 489).

Kibler testified, however, that Milstead "seemed" to be turning toward Kibler's position as Milstead emerged from the door (JA185). No other part of Kibler's testimony indicates that Milstead did anything that could be perceived as a threat by Kibler. To the contrary, Kibler testified that Milstead had his hands up, by his chin (JA221-22), and Kibler saw nothing in Milstead's hands or on his person that Kibler perceived as a weapon (JA187, 226-27). But then why did Kibler fire his weapon twice, in rapid succession?

The only explanation that has been offered in this case is that Kibler mistakenly "believed" that Milstead was Ramey. When asked to explain that belief, the only point offered by Kibler is that he had been informed by the 911 operator that Milstead had a gunshot wound in the neck, and (therefore?) Kibler did not believe that Milstead could have run out of the door (JA227).

But it has never been explained how Kibler reasonably could have mistaken Milstead for Ramey, because Kibler already had seen Milstead and Ramey inside the house, when Proctor and Kibler first entered. Kibler was standing next to Proctor, and would have had the same vantage point as Proctor, who clearly distinguished the "good guy" from the "bad guy." Kibler's various statements on what he perceived inside the house have been inconsistent and progressively more vague (see JA504-05, 511, 514). By the time of his deposition, Kibler claimed that he could no longer remember any details of who or what he saw inside the house (see JA151-53, 192-93). In contrast, Proctor's testimony was consistent and clear on the respective identifications of Ramey and Milstead (JA252-56). Thus, the only competent evidence of what a reasonable officer on the scene would have perceived is Proctor's testimony. But that testimony was disregarded by the decisions below, apparently because Kibler rather than Proctor did the shooting at

Milstead.

The Proceedings and Decisions Below

In October 1998, Mark Milstead's estate commenced this civil action for damages against Kibler, Proctor, and Whetzel, on a federal claim under 42 U.S.C. § 1983, based upon a deprivation of Fourth and Fourteenth Amendment rights, and pendent state law claims based upon both the shooting and the subsequent failure by the defendants to seek medical care for Milstead in time to save his life (JA10-16, 84-92).[8]

An initial motion to dismiss or for summary judgment by the defendants was denied by the district court in its 1999 opinion (31a-41a). In addressing the federal claim and the defendants' qualified immunity defense as posing essentially the same issue of objective reasonableness on the totality of the circumstances, the district court concluded that:

> "Accepting the facts as described in the complaint, it is possible that the defendants should have perceived that Mark Milstead posed no threat, was not armed, and should not have been confused with Ramey, the attacker who posed the real threat. The complaint allows for the inference that Mark was easily recognizable when he exited the house and therefore no reasonable officer would have fired upon him."

(36a-37a). The case then proceeded into discovery, which adduced the evidence noted above, including the testimony

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[8] In the district court, federal subject-matter jurisdiction was predicated upon 28 U.S.C. § 1343 for the federal claim, and 28 U.S.C. § 1367 for the pendent state law claims.

regarding the differential identification of Milstead and Ramey. However, upon a post-discovery defense motion for summary judgment based upon qualified immunity, the district court inexplicably granted that motion, on grounds inconsistent with its previous ruling.

In its 2000 opinion granting summary judgment, the district court appeared to shift from an objective test of reasonableness on the totality of the circumstances to a more subjective evaluation of the perceptions formed by Kibler alone, ignoring the evidence provided by the testimony of both Proctor and Kibler as to what they observed inside the house:

> "In the case at bar, defendant Kibler neither definitively ascertained whether Milstead had a gun, nor did he warn Milstead before shooting him. The dispatcher was unable to acquire a description of the intruder from Milstead; thus, the officers could not tell who was the gunless victim and who was the intruder possessing a gun. . . . Though what transpired was unfortunate, the court believes that a reasonable officer possessing the same information which Kibler possessed would have believed that the force used was lawful under the circumstances."

91 F. Supp. 2d at 901 (23a-24a). Moreover, while the district court's opinion is not entirely clear, it appears to rest its decision on qualified immunity doctrine rather than the substance of the Fourth Amendment. *See id.*

On appeal by the plaintiff to the Fourth Circuit, the court of appeals affirmed, but on yet a different line of reasoning. The court of appeals distinguished the qualified immunity question from the underlying standard of

constitutional law, and then proceeded to analyze the case under the Fourth Amendment's standard governing the use of force, as developed in Fourth Circuit case law from this Court's prior decisions in *Tennessee v. Garner*, 471 U.S. 1 (1985) and *Graham v. Connor*, 490 U.S. 386 (1989). *See* 243 F.3d at 161-63 (4a-7a).

However, like the district court, the court of appeals narrowed its Fourth Amendment focus in two crucial ways. First, the court of appeals limited its analysis to the perspective of Kibler alone, solely "[b]ecause it was Officer Kibler who fired the two shots that ultimately killed Mark Milstead," 243 F.3d at 162n.2 (13a), thus excluding consideration of the previous actions of both Kibler and Proctor that precipitated the final encounter. Second, the court of appeals limited itself to the circumstances "*known* to Officer Kibler," *id.* at 163 (7a) (emphasis added), thus excluding consideration of circumstances that should have been known to Kibler, or any other reasonable officer on the scene, and thereby converting an entirely objective test into a partially subjective one.

The court of appeals then proceeded to analyze Kibler's actions as a case of "mistaken identity," analogizing to this Court's prior decision in *Hill v. California*, 401 U.S. 797 (1971), involving a mistaken identity arrest. The court first ruled that Kibler constitutionally could have killed Ramey simply upon his emergence from the door of Milstead's house, without more. Then the court reasoned, by analogy to *Hill*, that because Kibler would have been justified in killing Ramey, he also was justified in killing Milstead, if his mistake of identity was either "understandable" or "reasonable."

In applying its "mistake" analysis, the court of appeals' opinion disregarded the evidence of what both Proctor and Kibler actually saw and heard inside the house,

and it accepted Kibler's testimony as true and credible, even in instances where Kibler's testimony was contradicted by the objective evidence, by the testimony of his fellow officers, or both. Instead, the court of appeals focused on five enumerated factors of "information" that Kibler claims to have possessed, none of which were based upon his sense perceptions and most of which in fact were untrue.[9] Thus, the court of appeals' Fourth Amendment analysis appears to place more stress on Kibler's second-hand misinformation (or on Kibler's imagination) than on facts that were available to Kibler from his own eyes and ears.

REASONS FOR ALLOWING THE WRIT

The questions presented for review by this Petition include important questions of federal law that should be resolved by this Court, as they involve conflicts of authority among the courts of appeals or between the decision below (and other similar decisions) and the ruling decisions of this Court. In particular, the decision below adds to a growing conflict among the circuits as to the proper scope of the Fourth Amendment's "totality of circumstances" test as applied to cases involving the unreasonable use of force by the police, and it represents a perceptible drift in Fourth Amendment jurisprudence away from objective standards of

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[9] Thus, of the five factors enumerated, the only one that was entirely true was that Milstead had been shot in the neck. It was also true that Ramey was armed with a gun, but the gun appears to have been empty at the time and it was not fired at Proctor, as Kibler himself observed, according to his testimony (JA154). That Ms. Cardwell had been stabbed was misinformation obtained from the dispatcher, and the idea that Ramey shouted threats to "kill" the officers affirmatively was disproved by the 911 tape, which recorded Ramey's shouts but no such threat (*see* JA501-07).

decision. Furthermore, the case points up the need to clarify and simplify both Fourth Amendment and qualified immunity doctrine in the recurrent context of deadly force cases, which is an area that this Court has not addressed comprehensively in many years.

But there is an even more fundamental and compelling reason why the Court should accept review in this case. Doctrinal conflicts or ambiguities, important though they may be, do not fully measure the proper exercise of this Court's judicial discretion to grant review on certiorari. The underlying conflict in this case represents an issue of transcendent importance in the organization of any civil society based upon the rule of law, and it is an issue that has drawn increasing public attention in recent years.

The Fourth Amendment's guarantee of the individual's right to physical security against violence by the state is essential to the exercise of all of our other liberties. Of course, it is a right that must be balanced against the legitimate needs of law enforcement and therefore security for all. But that balance should be re-examined periodically. There are increasing indications in both the public debate and the recent decisions, including the decision below in this case, that the legal system's approach has shifted too far in the direction of constituting public officers as a special class of people to hold the power of life and death over their fellow citizens, without effective accountability to anyone. The private remedies for Fourth Amendment violations were created for the very purpose of redressing that balance. This Court should insure that such remedies not only are just and practical, but also are perceived to be so by the general public.

This case presents an appropriate vehicle for addressing those questions, because it represents the core values protected by the Fourth Amendment. This is not a

"criminal procedure" case. Mark Milstead was not a "suspect;" he was a victim seeking police protection. It is demeaning to his memory that his estate should be required to litigate his Fourth Amendment right to exist under doctrines referring to him as the "suspect," and appear to grant unfair procedural advantage to those who caused his death.

I. This Case Involves Important Questions under the Fourth Amendment Decided in Conflict with the Decisions of other Courts of Appeals and of this Court.

The Fourth Amendment provides in pertinent part that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . ." U.S. Const. amd. IV. This case involves an individual's right to be secure in his person against unreasonable seizures by the use of deadly force. The font of this Court's current jurisprudence under this branch of the Fourth Amendment is *Tennessee v. Garner,* 471 U.S. 1 (1985), which affirmed that the use of deadly force by the police was subject to the same type of balancing analysis as were other seizures under the Fourth Amendment, and thus were required to be reasonable in light of the totality of the circumstances of the seizure. As applied in *Garner*, this principle meant that, even if there were probable cause to seize a suspect, "an officer may not always do so by killing him," 471 U.S. at 9. As the use of deadly force is the most intrusive possible type of seizure, its justification must be correspondingly compelling, essentially embodying the standard of necessity that is the more general standard justifying the lawful use of deadly force. Thus, in the absence of an imminent threat to the officer or to others, deadly force is constitutionally unreasonable.

Garner was supplemented by the more general decision on the use of force in *Graham v. Connor,* 490 U.S.

386 (1989), which laid down a completely objective balancing test for determining the constitutionality of any use of force by the police to seize a free citizen:

> "the 'reasonableness' inquiry in an excessive force case is an objective one: the question is whether the officers' actions are 'objectively reasonable" in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation. . . . An officer's evil intentions will not make a Fourth Amendment violation out of an objectively reasonable use of force; nor will an officer's good intentions make an objectively unreasonable use of force constitutional."

490 U.S. at 397. *Graham* further held that "[t]he 'reasonableness' of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight," *id.* at 396. Like *Garner*, *Graham* reaffirmed the applicability of the "totality of the circumstances" test, emphasizing that its proper application requires "careful attention to the facts and circumstances of each particular case," 490 U.S. at 496.

While the principles stated by *Garner* and *Graham* appear to be straightforward, the application of those principles by the lower federal courts have not. The first two question presented by this Petition both involve problematical applications by the decision below in this case. The first question concerns the scope of circumstances that are considered in applying the "totality of the circumstances" test in excessive force cases, and is the subject of and ongoing conflict in authority among the courts of appeals to which the decision below contributes The second question concerns the application of *Graham*'s standard of "the

perspective of a reasonable officer on the scene," as to which the decision below deepens a conflict between a line of Fourth Circuit and *Graham* itself.

A. The Scope of "Totality of the Circumstances"

A key aspect of the decision below was the court of appeals' narrow focus on the actions and events immediately surrounding Kibler's shooting of Milstead, to the exclusion of other events leading to that shooting and the actions of Kibler's fellow officer, Proctor. From this Court's general statements of the "totality of the circumstances" test, one would expect that any facts or circumstances that are logically or causally related to the shooting must be considered, and therefore the decision below would be clearly erroneous. However, in fact the decision below is in accord with rulings in a majority of the circuits, as well as prior rulings in the Fourth Circuit, holding that the "totality of the circumstances" actually excludes any circumstance that is not immediately proximate to the application of force.

The Second, Fourth, Fifth, Sixth, Eighth, and Tenth Circuits all appear to follow the rule that events or actions "leading up to" a police shooting are irrelevant to the objective reasonableness of the shooting.[10] The First and Third Circuits explicitly follow a different rule that considers pre-seizure conduct, acknowledged to be in conflict with the majority rule,[11] and Ninth Circuit implicitly follows the

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[10] *See Salim v. Proulx*, 93 F.3d 86 (2d Cir. 1996); *Elliot v. Leavitt*, 99 F.3d 640 (4th Cir. 1996); *Greenidge v. Ruffin*, 927 F.2d 789 (4th Cir. 1991); *Fraire v. City of Arlington*, 957 F.2d 1268 (5th Cir. 1992)(the leading case for this rule); *Dickerson v. McLellan*, 101 F.3d 1151 (6th Cir. 1996); *Cole v. Bone*, 993 F.2d 1328 (8th Cir. 1993); *Wilson v. Meeks*, 52 F.3d 1547 (10th Cir. 1995).

[11] *St. Hilaire v. City of Laconia*, 70 F.3d 20 (1st Cir. 1995);

minority rule.[12] The Seventh Circuit appears to have an intra-circuit conflict, with cases looking in both directions.[13]

The emerging leading case for the minority view is the 1999 decision by the Third Circuit in *Abraham v. Raso,* 183 F.3d 279 (3d Cir. 1999), which provides a rather compelling demonstration of why the majority view is both logically incoherent and legally inconsistent with the ruling decisions of this Court:

> "We reject the reasoning of [the majority rule] because we do not see how these cases can reconcile the Supreme Court's rule requiring examination of the 'totality of the circumstances' with a rigid rule that excludes all context and causes prior to that moment the seizure is finally accomplished. 'Totality' is an encompassing word. It implies that reasonableness should be sensitive to all of the factors bearing on the officer's use of force.
>
> "A more fundamental point is that it is far from clear what circumstances, if any, are left to be considered when events leading up to the shooting are excluded. How is the reasonableness of a bullet striking someone to be assessed if not by examining preceding

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Abraham v. Raso, 183 F.3d 279 (3d Cir. 1999).

[12] *See Alexander v. City and County of San Francisco,* 29 F.3d 1355 (9th Cir. 1994).

[13] *Compare Sherrod v. Berry,* 856 F.2d 802 (7th Cir. 1988)(en banc) *and Carter v. Buscher,* 973 F.2d 1328 (7th Cir. 1992) *with Plakas v. Drinski,* 19 F.3d 1143 (7th Cir. 1994) *and Deering v. Reich,* 183 F.3d 645 (7th Cir. 1991). We have not located pertinent decisions in the remaining two circuits, the D.C. and Eleventh.

> events? If we accept . . . the rule that pre-seizure conduct is irrelevant, then virtually every shooting would appear unjustified, for we would be unable to supply any rationale for the officer's conduct."

Id. at 291-92. In fact, courts purporting to follow the majority rule do consider certain pre-seizure conduct, and their exclusions of certain precipitating events are both unprincipled and unfair, as is illustrated in the current case, in which the decision below certain remote events–such as the information (mostly inaccurate) that Officer Kibler received before reaching the scene– while excluding consideration of logically more pertinent events, such as the officers' initial entry into Milstead's house, in which Kibler had an opportunity to observe, identify, and distinguish Milstead from Ramey, which plainly cuts against the conclusion that a "mistake" as to Milstead's identity could have been reasonable.

Moreover, in the current case the problem is exacerbated by the fact that some of the pre-shooting events involved a jointly-acting officer, Proctor, who unquestionably could distinguish Milstead from Ramey, and whose bungled confrontation with Ramey was the truly precipitating cause of Milstead's death. While this aspect of scope question is less well-developed in terms of inter-circuit conflict, it is potentially far more dangerous, as it produces the entirely perverse incentive for multiple jointly-acting officers to compartmentalize their knowledge, and thereby immunize each other essentially through a division of labor within their concerted activity. Whether or not that was a deliberate strategy by the defendants here–at the time of the events or in the formulation of defense tactics– it was successful with the court of appeals here, as it had been in the prior Fourth Circuit case of *McLenagan v. Karnes*, 27 F.3d 1002 (4th Cir. 1994), which was relied upon heavily by the defendants in

argument and by the court below in decision. If permitted to succeed more generally, one would expect that teams of police officers henceforth will be organized so as to keep at least one of their number– such as Kibler– so completely ignorant of the overall situation as to be able to shoot almost anyone, which essentially was the holding of the court below in this case. If that strategy succeeds, it will be the only place in our law where concerted action to injure actually reduces the prospect of liability in all of the concerted actors.

It would also be inconsistent with this Court's more general Fourth Amendment doctrine, which considers the actions and jointly-acting officers in assessing the reasonableness of searches and seizures, *see Whitely v. Warden,* 401 U.S. 560 (1971).

B. The Perspective of "A Reasonable Officer on the Scene"

The decision below in this case is only the most recent in a line of Fourth Circuit authority holding that the circumstances bearing on the reasonableness of a use of force "must be filtered through the lens of the officer's perceptions at the time of the incident in question," 243 F.3d at 163(7a), *quoting from Rowland v. Perry,* 41 F.3d 167, 173 (4th Cir. 1994); *see also Sigman v. Chapel Hill,* 161 F.3d 782 (4th Cir. 1998); *Gooden v. Howard County,* 954 F.2d 960 (4th Cir. 1992)(en banc). This entire line of authority is in conflict with this Court's holding in *Graham*, as it substitutes a subjective standard for the entirely objective test required by *Graham.*

There is a linguistically subtle but functionally crucial difference between this Court's reference in *Graham* to "the perspective of a reasonable officer on the scene" and the Fourth Circuit's formulation of "the lens of *the* officer's perceptions." Like a "reasonable prudent person," a

"reasonable officer on the scene" is a hypothetical construct designed to preserve the objectivity of the legal rule. A "reasonable officer on the scene" has average intelligence, training, perception, fortitude, and skills in both observation and police techniques. However, "the" officer on the scene in a given case may be myopic, hard-of-hearing, or unobservant.

The difference is well-illustrated by the facts of the current case. If we assume that Kibler's testimony was sincere, then he is an extraordinarily unobservant and unperceptive officer with an extremely poor memory. Though he was located next to Proctor during their initial entry to the house, he claims to have not heard Milstead's cries for help, he claims to have neither seen nor heard any of the things that Proctor saw and heard in the house, he claims to have not heard shouts and noises plainly recorded on the 911 tape, he claims not to have heard a gunshot that went off less than 30 feet away, through an open door. Kibler also claims to have seen and heard things that no one else saw and heard, and were demonstrably non-existent, such as seeing "a woman dressed in pink" wrestling on the floor with Milstead instead of Ramey (who was a good-sized man with a beard, dressed in blue), and hearing shouts from Ramey to "kill you all" which were not heard by anyone else and not heard on the 911 tape, which did record Ramey's shouts. Kibler claims to have seen Milstead turn toward him, and yet Milstead was found on post-mortem to have been shot from the side.

While all of these matters also raise questions regarding Kibler's credibility, they serve to illustrate why "the lens of *the* officer" cannot be the test of reasonableness under the Fourth Amendment. A person's right to life cannot be made be subject to forfeiture upon encountering a particularly myopic or inattentive police officer. That is a logical absurdity, and is in conflict with this Court's

controlling decision in *Graham.*

II. This Court Should Clarify and Simplify the Law Applicable to Cases Involving the Application of Deadly Force by the Police.

This case, and the many other cases involving the use of deadly force by the police, stand at the confluence of three complex bodies of doctrine: (1) Fourth Amendment jurisprudence; (2) qualified immunity; and (3) summary judgment. The existing precedents of both this Court and the lower courts do not clearly delineate the relationships among these bodies of law. As a result, the lower courts appear to have been struggling unnecessarily in excessive force cases, and especially in deadly force cases. In the interest of improving the administrability of the rules, the efficacy of the law in achieving its policy objectives, and in the longer run avoiding unnecessary future appeals, this Court should review and restate a simpler body of law to govern either excessive force cases generally, or deadly force cases in particular. The existing law is unduly complex.

At this stage of development, the superposition of qualified immunity doctrine on top of the Fourth Amendment's reasonableness test seems to be an unnecessary complication in excessive force cases. Whatever the merits of a concept of "reasonably unreasonble" in other contexts under the Fourth Amendment,[14] little seems to be gained by having a separate step addressed to qualified immunity in excessive force cases. The doctrine of qualified immunity was developed in a much broader context involving executive officials faced with uncertain questions of law. *See, e.g. Harlow v. Fitzgerald,* 457 U.S. 800 (1982).

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[14] *See Anderson v. Creighton,* 483 U.S. 635 (1987); *Wilson v. Layne,* 526 U.S. 603 (1999).

But in cases of deadly or excessive force under the Fourth Amendment, we now have "clearly established" standards of substantive liability. In most excessive force cases, the real issues are questions of fact, mixed questions of law and fact, or applications of an established standard to particular situation: was a given level of force "reasonable" in light of all of the facts and circumstances of the case, from the perspective of a "reasonable officer on the scene"? This is the way that the standard is stated in *Graham*, under the Fourth Amendment. Any per se rules of liability or non-liability can be accommodated within this structure. It is difficult to see what useful purpose is served by having a separate step of asking whether a "reasonable officer" would have known that his conduct violated an established right in this particular context.

In fact, some courts of appeals' decisions already have reached this conclusion,[15] while other cases are ambiguous as to whether the decision is based on the Fourth Amendment or qualified immunity.[16] This Court should dispel these inconsistencies and, if qualified immunity is to be retained, clearly delineate its separate function.

In addition, this Court should grant review to clarify the relationship between the Fourth Amendment standards, with or without qualified immunity, and the summary judgment standards of Civil Rule 56. To some extent, the problem arises from dicta in some of this Court's prior decisions, especially in the field of qualified immunity, emphasizing the importance of summary disposition in appropriate cases to vindicate the policies of qualified

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[15] *Roy v. Inhabitants of the City of Lewiston*, 42 F.3d 691 (1st Cir. 1994); *Doerle v. Rutherford*, 242 F.3d 1119, 1127 (9th Cir. 2001).

[16] *See*, e.g., *McLenagan v. Karnes*, 27 F.3d 1002 (4th Cir. 1994).

immunity.[17] However, our understanding of the holdings of such cases is that there is no special or different standard of summary judgment in qualified immunity cases, or in any other sort of case. The Court should clarify that point.

It may be true, in some contexts of qualified immunity involving unsettled areas of law, that summary judgment will have enhanced functional usefulness. But this is unlikely to be true in excessive force cases governed by the test of "reasonableness" on the "totality of the circumstances." In those cases, summary judgment may have diminished functional usefulness. Unless the lower courts are going to be permitted to pick and choose among circumstances to be considered– which seems plainly inconsistent with this Court's prior substantive rulings under the Fourth Amendment– then it would seem that summary judgment would only rarely be appropriate in such cases, as is true under other legal standards of objective reasonableness such as those in ordinary negligence cases. *See Howlett v. Birkdale Shipping Co.*, 512 U.S. 92 (1994). Ultimately, the undue encouragement toward summary disposition in such excessive force cases against the police (together with interlocutory appeals and the like) could have the perverse effect of protracting the ultimate disposition of the case.

In many if not most cases involving the use of physical force by the police, the factual issues will be relatively simple. In those instances, proceeding to trial may produce a faster and more efficient outcome in court of first instance, and more focused appeals. Especially as applied to police officers, who regularly testify as part of their job, this would not appear to be unreasonably burdensome on the defendants. It would also produce a result that is more likely

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[17] *See Harlow v. Fitzgerald,* 457 U.S. 800 (1982); *Mitchell v. Forsyth,* 472 U.S. 511 (1985); *Hunter v. Bryant,* 502 U.S. 224 (1991).

to be accepted by the general public, as it dispels the impression that the law is designed to grant special procedural rights to a privileged class of litigants and to undermine the right to trial by jury as the ultimate democratic control on abuses of official power.

III. The American Public Needs to Know that they Have a Just and Practical Remedy Against Unwarranted Police Violence Directed at the Innocent.

The death of Mark Milstead from police gunfire was produced in an episode described by the court of appeals as sounding "a tragic knell of classical proportions" (12a), and by the district court as involving a "series of blunders" (25a) by the responding officers, whose "actions taken together may be considered egregious and resulted in Milstead's death (21a). And yet, all of Milstead's claims for relief were denied by both courts, under a parsimonious view of constitutional and remedial law. Furthermore, his case was dismissed on summary judgment, without a full adjudication on the merits in which those responsible for his death would be required to appear and explain their actions in a public trial before a jury drawn from the community that those officers are sworn to protect. To a large extent, the court of appeals' apology for this result only adds insult to the injury: "we can only decide the limited legal question of whether a constitutional lawsuit lies against Officer Kibler" (12a). In other words, the court of appeals ruled as a matter of law that Mark Milstead somehow forfeited his constitutional right to be free of a violent death at the hands of the police, as well as his constitutional right to seek a trial by jury.

And how did this happen? Only because Milstead had the double misfortune of being both a victim of crime and a victim of inept assistance from his local police. Once the officers' blundering had turned a bad situation worse, then their absolute safety became more important than his

right to exist. And the further error of Kibler in supposedly "mistaking" Milstead for Ramey provides for ground for denying the remedy. Worse yet, the courts below are not even interested in a full development of the factual circumstances of the case through trial. That is the message of the ruling below.

Aside from the issues of doctrinal conflict and complexity raised above, we believe that the unsatisfactory and troubling nature of that message should influence this Court to exercise its discretionary power of review, because Mark Milstead's case is not unique nor perhaps even unusual in American life today. The public is concerned about unwarranted police violence against the citizenry, and the public deserves a better explanation than has been given to date by the lower federal courts.

Since this Court's last major address to excessive force in *Graham v. Connor* 12 years ago, a great deal has happened to influence the public's perception of the problem of excessive police violence. Within past few years alone, there have been dozens of episodes reported in the general media involving unwarranted violence by police, in cities and towns around the country. In New York, there was the well-known Diallo case, in which officers shot 41 times at an innocent man in the vestibule of his own apartment building after he reached for his wallet. That was said to be a case of "mistaken identity."[18] Last October in Los Angeles, a Halloween costume party guest was shot through the window of a suburban home by officers summoned to investigate a noise complaint, because he was holding a prop gun.[19] Two

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[18] *See* Timothy Lynch, *"We Own the Night": Amadou Diallo's Deadly Encounter with New York City's Street Crimes Unit*, Cato Institute Briefing Paper No. 56 (March 2000).

[19] *Los Angeles Times,* October 31, 2000, § A, Pt. 1, p.1.

months ago, in Huntington Beach, California, a teenager was shot to death on the street by police, because the teenager was holding a toy rifle. That also was said to be a "mistaken identity" case, as the police had been chasing someone else when they came across the teenager.[20] Similar episodes have occurred on the New Jersey Turnpike, in Cincinnati, Nashville, and elsewhere.[21] Just last week, the *Washington Post* ran a series of articles compiling statistics on shootings by the police in the 50 largest local law enforcement agencies.[22] Yesterday, the *Post* ran an article about the inadequacy of existing statistical compilations even to gage the magnitude of the problem.[23]

This heightened public attention to the problem of violence comes at a time when crime rates in general, and homicide rates in particular, have been dropping.[24] No one yet knows, but they are beginning to ask, whether rates of police violence are going in the opposite direction, and why.

Even a casual review of the reported case law in this area reveals a striking number of cases in which actually nonviolent or entirely innocent people are being shot by the

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[20] *Los Angeles Times*, June 14, 2001, Pt. 2, p.6.

[21] *See Los Angeles Times*, August 2, 2000, § A, Pt. 1, p. 11A; May 8, 2001, § A, Pt. 1, p. 14; May 24, 2001, § A, Pt. 1, p. 16.

[22] Craig Whitlock & David S. Sallis, "Officers Kill with Impunity," *Washington Post*, July 1, 2001, p. A1, (available at www.washingtonpost.com/wp-dyn/articles/A64231-2001Jun29.html).

[23] James J. Fyfe, "When Cops Kill, Someone Should Count," *Washington Post* July 8, 2001, p. B2, col. 4.

[24] *See* James Alan Fox and Marianne D. Zawitz, *Homicide Trends in the United States* (U.S. Department of Justice: 2000) (available at www.ojp.usdoj.gov/bjs/homicide).

police for doing relatively innocuous things.[25] Such cases are appearing with a depressing regularity, and they are appearing in all types and sizes of communities throughout the Nation, and they are creating public concern.

The public may not understand the niceties of legal doctrine, but they do understand when an innocent victim of police violence is turned away from the courts without a full hearing. As this Court has noted, the private civil remedy for Fourth Amendment violations can play an important role in assuring both that justice is done, and is publicly perceived to be done. *See Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics,* 403 U.S. 388 (1971). In many cases, it is the only viable remedy,[26] from the standpoint of both the victim and the larger interest in the full airing of such episodes in a public forum that is perceived to be thorough and fair. For better or worse, the public looks to the federal courts, and in particular to the decisions of this Court, for their assurance of vigilance against the potential for official abuse.

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[25] In addition to the cases cited in Point I above, *see*, e.g., *Anderson v. Russel,* 247 F.3d 125 (4th Cir. 2001); *Ribbey v. Cox,* 222 F.3d 1040 (8th Cir. 2000); *McCaslin v. Wilkins,* 183 F3d 775 (8th Cir. 1999).

[26] See *Washington Post* articles cited above, and Scott Glover & Matt Lait, "LAPD Police Misconduct Cases Rarely Resulted in Charges," *Los Angeles Times,* October 22, 2000, § A, Pt. 1, p. 1.

CONCLUSION

For the reasons stated above, a writ of certiorari should issue to review the judgment of the United States Court of Appeals for the Fourth Circuit.

Respectfully submitted,

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July 9, 2001

(Any footnotes trail end of each document)

No. 00-1539

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MATTHEW MILSTEAD, Administrator of the Estate of Mark Milstead, Plaintiff-Appellant,

v.

CHAD KIBLER; SCOTT PROCTOR; LESTER WHETZEL,

Defendants-Appellees.

January 22, 2001, Argued

March 15, 2001, Decided

COUNSEL:
ARGUED: Jeffrey S. Parker, Great Falls, Virginia, for Appellant.

Mark Dudley Obenshain, WHARTON, ALDHIZER & WEAVER, P.L.C., Harrisonburg, Virginia, for Appellees.

ON BRIEF: James R. Tate, TATE & BYWATER, LTD., Vienna, Virginia, for Appellant.

JUDGES:
Before WILKINSON, Chief Judge, NIEMEYER, Circuit Judge, and Malcolm J. HOWARD, United States District Judge for the Eastern District of North Carolina, sitting by designation.

OPINIONBY:
NIEMEYER

OPINION:

NIEMEYER, Circuit Judge:

The Administrator of the Estate of Mark Milstead brought this action under *42 U.S.C. § 1983,* alleging that three police officers used excessive force in violation of the Fourth and Fourteenth Amendments when one of the officers accidentally shot Milstead, mistaking him for an assailant who had just shot Milstead and his fiancee. The district court granted the officers' motion for summary judgment, relying on qualified immunity. Finding no constitutional violation, we affirm.

I

Following an emergency call on October 26, 1996, from Mark Milstead to the 911 operator in Shenandoah County, Virginia, Officers Chad Kibler and Scott Proctor, deputy sheriffs in Shenandoah County, and Lester Whetzel, a Woodstock, Virginia town police officer, were dispatched to 59 Indian Camp Trail at Bear Paw Road, in a secluded area in Shenandoah County in response to Milstead's call for help. Milstead reported that he and his fiancee were being attacked by an intruder, Steven Ramey, his fiancee's former boyfriend. The 911 operator reported Milstead's call to the officers, telling them that a man had been shot in the neck and a woman stabbed. n1 The officers received the call shortly after midnight and responded immediately. Upon their arrival at the house, they saw a van parked in front of the house, with the door open, and fresh blood on the van and on the steps leading to the house. They also heard calls for help from inside the house. As Officer Whetzel walked around the house, Officer Proctor, followed by Officer Kibler, proceeded to the front door. Proctor kicked open the door, yelled

"police," and took a couple of steps into the house. It is unclear whether Kibler, who was following closely behind, actually made it inside. Both officers saw two figures wrestling on the floor, one of whom withdrew from the altercation and warned them that the other had a gun. The person with the gun pointed it at Officer Proctor, whereupon Proctor stopped, began to back up, and fired four shots from his pistol. While backing up, Proctor fell backwards onto the deck outside the door. Kibler, believing that Proctor had been shot, retreated to the outside corner of the house where the steps from the front desk exited, and took a defensive position. Kibler then heard one of the people -- presumably Ramey -- say that he was going to "kill all of you." About 15 seconds after Officer Kibler's initial retreat from the front door, someone came crashing through the door "in a run" and turned toward where Officer Kibler was positioned. Kibler fired two shots, bringing the person down. While the person's hands were about chin level, Kibler did not see anything in them; the only light in the area was an outside wall light behind the person whom Kibler shot.

Officer Kibler explained later that when he fired his gun he believed that the target had to be the assailant Ramey because Milstead had been shot in the neck and could not therefore have been running. He also explained that Ramey had a gun, and that, shortly before the person believed to be Ramey came out of the house, someone said he was going to "kill you all." Kibler concluded that Ramey was making good on this threat.

Still alive, the person Officer Kibler shot told him, "He is still inside." Kibler then realized that he had shot Milstead and not Ramey. After talking with Milstead, Kibler went to the other side of the house and told Officer Proctor that he had shot "the good guy." Proctor told Kibler to return to cover and be watchful for Ramey. After backup arrived several minutes later, the officers removed Milstead and transported him to the hospital, where he died shortly

thereafter from the shots fired by Officer Kibler. The officers determined later that Ramey had killed himself with a shot to his head and that Milstead's fiancee had also died.

Milstead's estate commenced this action under *42 U.S.C. § 1983,* alleging that Officer Kibler had used excessive force in violation of the Fourth and Fourteenth Amendments and alleging state claims based on the fact that the officers failed to seek medical care in time to save Milstead's life. The district court granted the officers' motion for summary judgment, dismissing the federal claims on qualified immunity and dismissing the state claims because the plaintiff failed to advance sufficient proof in support of them. This appeal followed, challenging only the qualified immunity ruling.

II

The Administrator of the Estate contends that the "unjustified killing of an innocent person by the police . . . who had been summoned . . . to protect and assist" Milstead constituted excessive force, in violation of the Fourth and Fourteenth Amendments, and that, in finding the officers in this case immune from liability, the district court "failed to consider the full evidentiary record, it improperly weighed evidence, it failed to consider the totality of the circumstances, it failed consistently to apply the correct objective standard of conduct, it failed to draw all permissible inferences in favor of the nonmoving party, and ultimately degenerated into fact-finding by the trial judge. " The Administrator argues that if the record is taken as a whole and in a light most favorable to Milstead and if the correct legal standard is applied, "the killing of Mark Milstead was unreasonable as a matter of law."

The legal principles governing qualified immunity analysis are well established. "Police officers are protected by qualified immunity when performing their duties within the scope of their employment insofar as their conduct does not

breach 'clearly established statutory or constitutional rights of which a reasonable person would have known.'" *Sigman v. Town of Chapel Hill, 161 F.3d 782, 786 (4th Cir. 1998)* (quoting *Harlow v. Fitzgerald, 457 U.S. 800, 818, 73 L. Ed. 2d 396, 102 S. Ct. 2727 (1982))*. The reasonableness inquiry is an objective one, "measured by reference to clearly established law." *Harlow, 457 U.S. at 818*. At bottom, police officers performing a discretionary function enjoy an immunity that shields them from liability for civil damages unless (1) the officers' conduct violates a federal statutory or constitutional right, and (2) the right was clearly established at the time of the conduct, such that (3) an objectively reasonable officer would have understood that the conduct violated that right. See *Wilson v. Layne, 526 U.S. 603, 614-15, 143 L. Ed. 2d 818, 119 S. Ct. 1692 (1999); Anderson v. Creighton, 483 U.S. 635, 638-40, 97 L. Ed. 2d 523, 107 S. Ct. 3034 (1987); Harlow, 457 U.S. at 818-19.*

The "first inquiry" in the analytical structure by which the qualified immunity defense is addressed is whether a violation of a constitutional right has been alleged. *Siegert v. Gilley, 500 U.S. 226, 231, 114 L. Ed. 2d 277, 111 S. Ct. 1789 (1991)*. Thus, when the qualified immunity defense is asserted, "on summary judgment, the judge appropriately may determine, not only the currently applicable law, but whether that law was clearly established at the time an action occurred." Id. (quoting *Harlow, 457 U.S. at 818)* (internal quotation marks omitted (alteration removed)). And "concomitant" to these determinations is the determination "of whether the plaintiff has asserted a violation of a constitutional right at all." Id. at 232. In Siegert, after establishing this framework, the Court then proceeded to determine first whether the plaintiff alleged a violation of the Constitution.

This analytical sequence was confirmed in *Wilson v. Layne, 526 U.S. 603, 143 L. Ed. 2d 818, 119 S. Ct. 1692 (1999),* in which the Court reiterated that"[a] court evaluating

a claim of qualified immunity 'must first determine whether the plaintiff has alleged the deprivation of an actual constitutional right at all, and if so, proceed to determine whether that right was clearly established at the time of the alleged violation'" *Id. at 609* (emphasis added) (quoting *Conn v. Gabbert, 526 U.S. 286, 290, 143 L. Ed. 2d 399, 119 S. Ct. 1292 (1999))*. This procedure applies even when the non-constitutional issues in the analysis may resolve the immunity issue more easily than the underlying question of constitutional law. See *County of Sacramento v. Lewis, 523 U.S. 833, 841 n.5, 140 L. Ed. 2d 1043, 118 S. Ct. 1708 (1998)*. Were courts to rule on qualified immunity without determining the constitutionality of the challenged conduct, "standards of official conduct would tend to remain uncertain, to the detriment both of officials and individuals. An immunity determination, with nothing more, provides no clear standard, constitutional or nonconstitutional." Id.

Accordingly, in this case we turn first to the question of whether the Administrator has alleged or demonstrated that the conduct of any of the three officers violated Milstead's constitutional rights. Only if we find a constitutional violation may we proceed further in the analysis. n2 See *Wilson, 526 U.S. at 609.*

"All claims that law enforcement officers have used excessive force -- deadly or not -- in the course of an arrest, investigatory stop, or other 'seizure' of a free citizen should be analyzed under the Fourth Amendment and its 'reasonableness' standard." *Vathekan v. Prince George's County, Md., 154 F.3d 173, 178 (4th Cir. 1998)* (quoting *Graham v. Connor, 490 U.S. 386, 395, 104 L. Ed. 2d 443, 109 S. Ct. 1865 (1989))* (emphasis in Graham, alteration in Vathekan, internal quotation marks omitted). "The test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application," *Bell v. Wolfish, 441 U.S. 520, 559, 60 L. Ed. 2d 447, 99 S. Ct. 1861 (1979),* but "requires careful attention to the facts and

circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight," *Graham, 490 U.S. at 396.* Thus, in determining the constitutionality of the use of deadly force, a court must decide "whether the totality of the circumstances justified" the use of deadly force in the particular circumstances of the case before it. *Tennessee v. Garner, 471 U.S. 1, 8-9, 85 L. Ed. 2d 1, 105 S. Ct. 1694 (1985).* But the use of deadly force is justified only in circumstances where "it is necessary to prevent the escape [of the suspect] and the officer has probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officer or others." *Id. at 3.* An officer's use of force is "judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight," allowing for the fact that "police officers are often forced to make split-second judgments -- in circumstances that are tense, uncertain, and rapidly evolving -- about the amount of force that is necessary in a particular situation." *Graham, 490 U.S. at 396, 397.* Thus, the objective facts "must be filtered through the lens of the officer's perceptions at the time of the incident in question." *Rowland v. Perry, 41 F.3d 167, 173 (4th Cir. 1994).* This "limits second-guessing the reasonableness of actions with the benefit of 20/20 hindsight" and "limits the need for decision-makers to sort through conflicting versions of the 'actual' facts, and allows them to focus instead on what the police officer reasonably perceived." Id.; see also *Gooden v. Howard County, Md., 954 F.2d 960, 965 (4th Cir. 1992)* (en banc).

In this case, we determine first whether the totality of the circumstances known to Officer Kibler would give a reasonable officer probable cause to believe that the person who crashed through the door in a run and turned toward him "posed a threat of serious physical harm, either to [Officer

Kibler] or to others." *Garner, 471 U.S. at 11.* If we assume for the moment that this person had been Ramey, we believe that the use of deadly force in the circumstances would clearly have been justified. Kibler knew that Ramey had shot Milstead in the neck and stabbed his former girlfriend. He also believed that Ramey had shot Officer Proctor. He knew that Ramey had a gun, and he had heard Ramey shout from within the house that he was going to "kill you all." While Kibler waited the seconds before the believed-to-be assailant came crashing out, he recognized that the only door to the house exited to the deck and down the steps to where he had taken his position. And when the believed-to-be assailant actually came crashing through the door "in a run" and turned toward his position, presumably with a gun, Officer Kibler had no more than a second or two to react. From the perspective of a reasonable officer, Ramey obviously would have posed a deadly threat to both Kibler and the other officers at this dark, remote location, and therefore the use of deadly force against Ramey would have been justified.

But, as it turned out, the person who came crashing through the door was not Ramey, but rather Milstead. There is no dispute that at the time Officer Kibler fired his two shots, he did not know this. Only after he shot Milstead, when Milstead revealed the reality of the situation by his statement, "He is still inside," did Officer Kibler first recognize his mistake. He promptly went to Officer Proctor and told him that he had just shot "the good guy." Thus, just as clearly as Officer Kibler intended to shoot Ramey when he came out the door, he clearly did not intend to shoot Milstead. This leaves us with the question of whether, in making this mistake, Officer Kibler violated Milstead's Fourth Amendment rights.

A mistake of this type generally takes on one of two forms. One is typified by the officer who shoots (with justification) at a suspect but misses, accidently hitting a bystander. The officer intended to direct deadly force against

the suspect but not against the innocent victim. The second form is typified by the officer who shoots (with justification) at a person he believes to be the suspect and hits the intended target, but in fact, the target was misidentified and turns out to be an innocent victim. In that situation, the officer intended to direct deadly force against an innocent victim, but did so under a mistaken belief that he was the suspect.

Under the first form of mistake, where the seizure is directed appropriately at the suspect but inadvertently injures an innocent person, the innocent victim's injury or death is not a seizure that implicates the Fourth Amendment because the means of the seizure were not deliberately applied to the victim. See *Brower v. County of Inyo, 489 U.S. 593, 596-97, 103 L. Ed. 2d 628, 109 S. Ct. 1378 (1989); Landol-Rivera v. Cruz Cosme, 906 F.2d 791, 794-95 (1st Cir. 1990).* In this vein, we have held that when officers shoot at a suspect, but hit a bystander instead, no Fourth Amendment seizure occurs. *Rucker v. Harford County, Md., 946 F.2d 278, 281 (4th Cir. 1991)* ("One is 'seized' within the fourth amendment's meaning only when one is the intended object of a physical restraint by an agent of the state" (emphasis in original)).

But the circumstances in this case fall under the second form of mistake where the officer deliberately directs his force against an innocent victim, believing him, although mistakenly, to be the suspect. This seizure of the innocent victim implicates the Fourth Amendment, but it is not necessarily unreasonable and therefore in violation of the Fourth Amendment. See *Hill v. California, 401 U.S. 797, 803-04, 28 L. Ed. 2d 484, 91 S. Ct. 1106 (1971)* (holding that when police have probable cause to arrest one party and they reasonably mistake a second party for the first, then the arrest of the second party is valid); cf. *Vathekan, 154 F.3d at 178* (noting that officer's release of attack dog that "cannot discriminate between a criminal and an innocent person" and that attacks an innocent victim is a seizure implicating the Fourth Amendment).

In Hill, the police officers had probable cause to arrest Hill for burglary, and when they went to Hill's apartment to effect his arrest, Miller, who fit the description of Hill, answered the door. Miller said that he was not Hill but was waiting for him, and produced evidence to prove his identity. But the police, disbelieving Miller, proceeded to arrest him and search the apartment, discovering evidence that ultimately convicted Hill. In upholding the arrest of Miller, the Supreme Court noted that fake identifications were not an uncommon method employed to evade arrest, that Miller resembled Hill, and that Miller's lack of explanation for his mode of entry into the apartment, which had a lock on the door, was not convincing to the officers. In finding both the arrest and the search reasonable and valid under the Fourth Amendment, the Court stated that even though the officers turned out to be "quite wrong," "sufficient probability, not certainty, is the touchstone of reasonableness under the Fourth Amendment and on the record before us the officers' mistake was understandable and the arrest a reasonable response to the situation facing them at the time. " Id. at 804.

The principle that the Supreme Court applied in Hill -- that no Fourth Amendment violation occurs when the "officers' mistake was understandable and the arrest a reasonable response to the situation facing them at the time" -- is at the root of several of our holdings concluding that officers' use of force was reasonable in situations where they had probable cause to believe that the suspect had a weapon, but their belief turned out to be mistaken. See, e.g., *McLenagan v. Karnes, 27 F.3d 1002 (4th Cir. 1994)* (noting the reasonableness of an officer's conduct where the officer shot a suspect upon receiving a warning from a third person that the suspect had a gun, even though the suspect actually had no weapon); *Slattery v. Rizzo, 939 F.2d 213 (4th Cir. 1991)* (holding force reasonable where an officer could have had probable cause to believe that a suspect posed a deadly threat even though the suspect turned out to be unarmed); cf.

Sigman, 161 F.3d at 788 (concluding that an officer's conduct was reasonable when he shot a suspect, believing that the suspect had a knife, even though onlookers said that they saw no knife). In all of these cases, the objective facts, filtered through the lens of the officer's perception, gave the officer probable cause to believe that his use of force was justified. And when the force would have been justified if the belief had been correct, we have found no Fourth Amendment violation. In short, a mistaken understanding of the facts that is reasonable in the circumstances can render a seizure based on that understanding reasonable under the Fourth Amendment.

In this case, we believe that Officer Kibler's mistaken understanding did not make his use of force unreasonable. The information that Kibler had at the time he shot Milstead was that (1) a female had been stabbed, (2) Milstead had been shot in the neck, (3) the intruder, Ramey, was armed with a gun, (4) Ramey had apparently shot at Officer Proctor, and (5) Ramey had threatened to kill all of the officers.

Blood had already been shed, as Officer Kibler witnessed upon his arrival at the scene. As Kibler waited the few seconds in the dark after Officer Proctor and Ramey apparently exchanged gunfire, he did not know where Milstead or Ramey was. He did know, however, that Milstead had been shot in the neck, and therefore he believed that, when someone crashed through the front door in a run, it had to be Ramey. Although he did not see a gun, he knew that Ramey had a gun only seconds earlier. Moreover, because of the poor lighting, he could not be sure that he was not holding a gun. In the second or two after the person's crashing exit through the door, Kibler had to decide whether to fire. In this instant of mortal danger, he fired, intending to end the threat posed by Ramey. His mistake was tragic.

But courts cannot second guess the split-second judgments of a police officer to use deadly force in a context

of rapidly evolving circumstances, when inaction could threaten the safety of the officers or others. See *Graham, 490 U.S. at 396-97; McLenagan, 27 F.3d at 1007-08.* While we know in hindsight that Officer Kibler mistakenly shot Milstead, instead of Ramey, this mistake does not negate the justification for the use of deadly force where Officer Kibler had an objectively reasonable belief that Milstead was Ramey. "The Fourth Amendment addresses 'misuse of power,' not the accidental effects of otherwise lawful conduct." *Brower, 489 U.S. at 596* (internal citation omitted).

Because no Fourth Amendment violation was shown, we need not proceed with the remainder of the qualified immunity analysis, i.e., to determine whether the right was clearly established at the time of the conduct or to resolve whether the contours of such a clearly established right were sufficiently clear that a reasonable officer would understand that he was violating the right. See *Wilson, 526 U.S. at 614-15.*

We acknowledge that the facts of this case -- triggered by the criminal conduct of Ramey -- sound a tragic knell of classical proportions. Ramey murdered Milstead's fiancee, who was pregnant. Officer Kibler attempted to perform his duty to assist Milstead, but instead killed him by mistake. And Ramey in the end committed suicide. Officer Kibler and the families of the innocent, as well as the family of the suspect, must live with these painful memories. Presented with this lawsuit by Milstead's family against Officer Kibler, we can only decide the limited legal question of whether a constitutional lawsuit lies against Officer Kibler. We conclude that it does not.

AFFIRMED

----------Footnotes----------

n1 In fact, the 911 operator misreported somewhat the substance of Milstead's call. Milstead had actually reported that his fiancee had been shot and might be dead and that he had been shot in the throat. n2 Because it was Officer Kibler who fired the two shots that ultimately killed Mark Milstead, the analysis focuses through the lens of his perspective. While Officers Proctor and Whetzel are also named defendants, the complaint fails to allege that either violated any of Mark Milstead's constitutional rights. Accordingly, we direct our analysis to whether Officer Kibler deprived Mark Milstead of a constitutional right in shooting him on October 26, 1996.

CIVIL ACTION NO. 5:98CV00075

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF VIRGINIA, HARRISONBURG DIVISION

MATTHEW MILSTEAD, Administrator of the Estate of MARK MILSTEAD,
Plaintiff,

v.

CHAD KIBLER, et al.,
Defendants.

March 30, 2000, Decided

COUNSEL:
For MATTHEW MILSTEAD, plaintiff: James Roscoe Tate, TATE & BYWATER, LTD., VIENNA, VA.

For CHAD KIBLER, SCOTT PROCTOR, LESTER WHETZEL, defendants: Mark Dudley Obenshain, WHARTON, ALDHIZER & WEAVER, PLC, HARRISONBURG, VA USA.

JUDGES:
James H. Michael, Jr., Senior United States District Judge.

OPINIONBY:
James H. Michael, Jr.

OPINION:

MEMORANDUM OPINION

JUDGE JAMES H. MICHAEL, JR.

On November 19, 1999, the United States Magistrate Judge B. Waugh Crigler conducted evidentiary proceedings in accordance with an Order by this court to render a report setting forth appropriate findings, conclusions and recommendation on the dispositive issues in the case. On November 24, 1999, the Magistrate Judge filed his Report and Recommendation, concluding that the court should deny the plaintiff's motion for summary judgment and grant the defendants' motion for summary judgment on all counts. The plaintiff filed an objection to the Report and Recommendation to which the defendants responded. Under *28 U.S.C. § 636*(b)(1)(B)&(C), this court "shall make a de novo review determination of those portions of the report . . . to which the objection is made." After a thorough examination of the full record of this case, the court overrules the plaintiff's objection and adopts the conclusion of Magistrate's Report and Recommendation.

I.

On October 25, 1996, Mark Milstead and his pregnant fiance, Jill Cardwell, were attacked by an intruder at their residence in Shenandoah County. The intruder, later determined to be Steven Ramey, n1 shot and killed Ms. Cardwell as she slept. A gunfight between Mark Milstead and Ramey ensued. After Ramey fled, Mark Milstead called 911 at 12:14 a.m. on October 26, 1996. Milstead informed the dispatcher that he had been shot in the throat and that his girlfriend had been stabbed by Ramey. During Milstead's conversation with the dispatcher, Ramey reentered the house. The defendants, two of whom are deputy sheriffs with Shenandoah County (Chad Kibler and Scott Proctor) and one of whom is a police officer for Woodstock County (Lester Whetzel), responded to the scene. However, due to Ramey's return, the only information from Milstead the dispatcher was able to relay to the officers was that a woman had been

stabbed and a man shot in the throat. When the defendants arrived at the scene they had no information regarding who was the victim or the intruder because the dispatcher was unable to give them a description of the intruder.

As they were walking towards the house, the officers noted fresh blood on a vehicle parked outside the house. The officers knocked on the door and a voice from inside screamed, "Kick it in! Help!" As the defendants entered the residence, they saw the person later identified as Ramey and Mark Milstead struggling with Milstead in a superior position, kneeling over Ramey. When the defendants yelled "Police!" and approached the combatants, Milstead broke from his superior position and yelled, "He's got a gun!" The defendants immediately found a gun pointed at them by Ramey. Proctor tried to find cover and fired four shots (without effect) at Ramey before he fell backwards out the door onto the deck, losing his eye glasses. The three defendants then positioned themselves outside, in front of and around the residence. This was followed by taunts screamed by Ramey, yelling by Milstead, and Proctor alerting everyone that there was a man with a gun. Milstead shouted "he's getting more ammo" and fled out the front door. Kibler immediately fired upon Mark Milstead without warning as he exited his residence approximately 12 to 15 feet away from Kibler. Milstead was struck in the arm and chest by the bullets from Kibler's gun and collapsed on the deck in front of the open door. He then gasped to Kibler that the intruder was still inside. Kibler apparently had gotten a quick glance at the struggle inside, but thought that the man on top was the aggressor while the one underneath was the female victim. Further, he believed that Proctor had been shot. When Milstead burst through the door attempting to escape, Kibler could not tell whether he had a gun, but states that this person's hands were up in the air, though not exactly sure where.

Kibler informed Proctor of the shooting incident, but Proctor informed him to return to his position. Kibler did not radio for medical assistance at that time because he knew that arrangements for emergency medical assistance had already been made and would be available to Milstead as soon as the scene was secure. Further, Deputy Proctor conveyed an additional request for medical assistance almost immediately after Milstead was shot. Shortly thereafter, Ramey killed himself with one gunshot to the head. Allegedly, Milstead informed Kibler that "he was dying." Due to the uncertainty of whether Ramey was still on a rampage, Kibler was again informed that he was to stay at his post. Thus, he did not move Milstead to safety, nor did he inform the other defendants or medical personnel that Milstead's condition was deteriorating. Finally, after more backup units arrived, Kibler removed Milstead from the deck. Despite these efforts, Mark Milstead died as a result of the chest wound after he arrived at the hospital.

Plaintiff Matthew Milstead filed a complaint against defendants Chad Kibler, Scott Proctor, and Lester Whetzel, invoking federal jurisdiction pursuant to *28 U.S.C. § § 1343* and 1367, *42 U.S.C. § § 1983* and 1988. n2 In Count I (PP 32-33), the plaintiff alleged the defendants violated his deceased brother's Fourth and Fourteenth Amendment rights by using deadly force. In Count II (PP 34-36), the plaintiff alleged negligence on the part of defendants in their use of deadly force causing his brother's death. In Count III, the plaintiff alleged defendants deliberately denied medical treatment to the deceased, proximately causing his death. The plaintiff seeks $ 10 million in compensatory damages.

Defendants answered the complaint on November 4, 1998, along with their motion to dismiss or for summary judgment. Defendants admit that they are police officers and were acting under color of law at the time of the incident involving plaintiff's brother and admit that one of the defendants shot the deceased, but deny liability. The

defendants motion to dismiss was denied by this court on April 19, 1999.

Both parties now have filed motions for summary judgment. The plaintiff believes summary judgment in his favor is proper because of the defendants' gross negligence in using deadly force, and by depriving the deceased of necessary medical attention. The defendants largely rely on qualified immunity to support their position that summary judgment should be granted in their favor.

II.

Summary judgment is appropriate only if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *See* F.R.Civ.P. 56(c). The facts must be viewed in the light most favorable to the non-moving party. *See Anderson v. Liberty Lobby, 477 U.S. 242, 248, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986); Charbonnages de France v. Smith, 597 F.2d 406 (4th Cir. 1979).* The movant has the burden of showing the absence of evidence to support the non-movant's case. *See Celotex Corp. v. Catrett, 477 U.S. 317, 325, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986); see also Cray Communications, Inc. v. Novatel Computer Sys., Inc., 33 F.3d 390, 393-394 (4th Cir. 1994).*

A. FOURTH AND FOURTEENTH AMENDMENT CLAIMS

The plaintiff claims entitlement to summary judgment on the Fourth and Fourteenth Amendment claims under *42 U.S.C. § 1983* because of the unreasonable and excessive deadly force used in the victim's seizure. The Fourteenth Amendment provides for recovery when the actions violating the plaintiff's Constitutional rights are so egregious that their egregious nature "shocks the conscience." *See County of Sacramento v. Lewis, 523 U.S. 833, 118 S. Ct. 1708, 1717, 140 L. Ed. 2d 1043 (1998).* However, the Supreme Court has

held that "all claims that law enforcement officers have used excessive force--deadly or not--in the course of an arrest, investigatory stop, or other 'seizure' of a free citizen should be analyzed under the Fourth Amendment and its 'reasonableness' standard." *Vathekan v. Prince George's County, 154 F.3d 173, 178 (4th Cir. 1998)* (quoting *Graham v. Connor, 490 U.S. 386, 395, 104 L. Ed. 2d 443, 109 S. Ct. 1865 (1989))*. Thus, the proper avenue of recourse for the plaintiff is through the Fourth Amendment.

An officer's actions are judged on a standard of objective reasonableness when a plaintiff alleges that a police officer unconstitutionally used deadly force. *See Sigman v. Town of Chapel Hill, 161 F.3d 782, 787 (4th Cir. 1998)* (citing *Graham v. Connor, 490 U.S. 386, 396-97, 104 L. Ed. 2d 443, 109 S. Ct. 1865 (1989))*. To determine objective reasonableness, a court must consider what a "reasonable officer on the scene" would have done. A court should consider factors such as "the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight." *Sigman, 161 F.3d at 787* (quoting *Graham, 490 U.S. at 396)*. Further, "the calculus of the reasonableness must embody allowances for the fact that police officers are often forced to make split-second judgments--in circumstances that are tense, uncertain, and rapidly evolving--about the amount of force that is necessary in a particular situation." *Sigman, 161 F.3d 787* (quoting *Graham, 490 U.S. at 396-97)*.

The Fourth Circuit utilizes the same reasonableness consideration under the doctrine of qualified immunity. *See Rowland v. Perry, 41 F.3d 167, 173 (4th Cir. 1994)*. Under this doctrine, government officials performing discretionary functions are not liable under § 1983 so long as their conduct does not run afoul of "clearly established statutory or constitutional rights of which a reasonable person would have known." *McLenagan v. Karnes, 27 F.3d 1002, 1006 (4th Cir.*

1994) (quoting *Harlow v. Fitzgerald, 457 U.S. 800, 818, 73 L. Ed. 2d 396, 102 S. Ct. 2727 (1982)).* Qualified immunity is an immunity from suit and not merely a defense to liability. As such, "courts must scrutinize and dismiss appropriate cases on qualified immunity grounds early in the litigation." *Sigman, 161 F.3d at 785* (citing *Mitchell v. Forsyth, 472 U.S. 511, 526, 86 L. Ed. 2d 411, 105 S. Ct. 2806 (1985)).* When courts decline such scrutiny, some of the protections afforded by the defense of qualified immunity may be foregone, because the immunity includes "an entitlement not to stand trial or face the other burdens of litigation, conditioned on the resolution of the essentially legal question." *Sigman, 161 F.3d at 785* (quoting *Mitchell, 472 U.S. at 526).*

In determining whether a police officer is liable under § 1983 a court must: (1) identify the specific right allegedly violated; (2) determine whether at the time of the incident the right was clearly established; and (3) decide whether "a reasonable officer could have believed that the use of force alleged was objectively reasonable in light of the circumstances," *Vathekan, 154 F.3d at 179,* similar to the reasonable analysis under the Fourth Amendment:

To gauge objective reasonableness, a court examines only the actions at issue and measures them against what a reasonable police officer would do under the circumstances. Subjective factors involving the officer's motives, intent or propensities are not relevant. The objective nature of the inquiry is specifically intended to limit examination into an officer's subjective state of mind, and thereby enhance the chances of a speedy disposition of the case. Though it focuses on objective facts, the immunity inquiry must be filtered through the lens of the officer's perceptions at the time of the incident in question. Such a perspective serves two purposes. First, using the officer's perception of the facts at the time limits second-guessing the reasonableness of actions with the benefit of 20/20 hindsight. Second, using this perspective

limits the need for decision-makers to sort through conflicting versions of the "actual" facts, and allows them to focus instead on what the police officer reasonably perceived. In sum, the officer's subjective state of mind is not relevant to the qualified immunity inquiry but his perceptions of the objective facts of the incident in question are.

Rowland, 41 F.3d at 172-73 (citations within omitted).

The specific right violated is the right against the use of deadly force. The law clearly establishes that "a police officer's use of deadly force is not excessive where he has probable cause to believe that a suspect poses a threat of serious physical harm to the officer or others." *McLenagan, 27 F.3d at 1006-7* (citing *Tennessee v. Garner, 471 U.S. 1, 11, 85 L. Ed. 2d 1, 105 S. Ct. 1694 (1985)).* Regardless of whether probable cause actually existed, if a reasonable officer possessing the same particularized information as the defendants had, believed that his conduct was lawful in light of *Garner*, then the defendants are entitled to qualified immunity. *See 27 F.3d at 1007.*

The plaintiff claims he is entitled to summary judgment on the facts of this case. Although the officers' actions taken together may be considered egregious and resulted in Milstead's death, viewed in the light most favorable to the defendants, a fact finder could maintain that a reasonable officer could have believed that the force used was reasonable in light of the circumstances. When the defendants arrived at the scene, they were aware that there were two victims and an intruder inside the house. Unfortunately, apart from the female victim, the defendants were unable to ascertain who was the intruder and who was the victim because the dispatcher was unable to give them a description of the males. Kibler though he saw a man over the female victim and that Proctor had been shot. When a man exited the house--the same man that Kibler thought was kneeling over the female victim--he shot Milstead. Under

these facts, the court denies plaintiff's motion for summary judgment.

However, whether to grant defendant's motion for summary judgment is a closer question for this court. Proctor, followed by Kibler, attempted to enter the residence, but were immediately at risk when Ramey pointed his gun at them. It is evident from the 911 tape that Proctor fired four shots, missing Ramey with each one, before falling backwards onto the deck. The defendants were aware that they had left at least one live victim inside with the gunman; however, because of the dispatcher's inability to give a description of the intruder, the defendants could not tell who the intruder and who was the victim during the brief time that they were inside the residence. The defendants immediately positioned themselves so as to secure the outside of the residence in case the assailant attempted to escape. Meanwhile, the man now known to be Ramey continued taunting the defendants to "come in and get him." When Milstead came running out of the house, Kibler inflicted a fatal wound to the chest.

As the defendants note, this case is substantially similar to *McLenagan v. Karnes, 27 F.3d 1002 (4th Cir. 1994).* In *McLenagan*, the defendant accidently shot the wrong arrestee when a fellow police officer came running from the building screaming, "The man has got a gun!" Following the police officer was the plaintiff, a gunless arrestee also trying to escape from the arrestee possessing the gun. Without warning and without ascertaining whether the plaintiff actually had a gun, the defendant shot the plaintiff. *See id. at 1005.* The court stated that "the hesitation involved in giving a warning could readily cause such a warning to be his last." *Id. at 1007.* As such, the court declined "to fashion an inflexible rule that, in order to avoid civil liability, an officer must always warn his suspect before firing--particularly where . . . such a warning might easily have cost the officer his life." *Id.* Additionally, the officer in *McLenagan* may not have seen a

gun in the plaintiff's hands; however, he also could not confirm there was no gun. In this regard, the court elected not to second guess the split-second judgment of a trained police officer. *See id. at 1007-08.* Accordingly, the court granted the defendant's summary judgment motion based on qualified immunity even though no warning was given, nor was a gun actually seen in the plaintiff's hands. *See id. at 1007.*

In the case at bar, defendant Kibler neither definitively ascertained whether Milstead had a gun, nor did he warn Milstead before shooting him. The dispatcher was unable to acquire a description of the intruder from Milstead; thus, the officers could not tell who was the gunless victim and who was the intruder possessing a gun. Moreover, Kibler was listening to raving taunts from Ramey and Milstead's warning that Ramey was getting more ammunition which added to the intensity and chaos of the scene. As in *McLenagan*, the 911 tape clearly shows this was a crisis situation which required the defendant to react quickly or else he or others may have been harmed. Thus, the defendants claim that under these facts, qualified immunity should also apply to the defendants. Contrarily, the plaintiffs attempt to create an issue of material fact by claiming that Kibler was fully aware that Milstead did not have a gun. *See Vathekan, 154 F.3d at 179-80* (stating "summary judgment on qualified immunity grounds is improper a long as there remains any material factual dispute regarding the actual conduct of the defendants") (citation omitted). However, as the Magistrate Judge noted the plaintiffs are unable to point to any part of the record that indicates that Kibler knew Milstead did not possess a gun. This places this case in the split-second timing scenario set out in *McLenagan. See also Sigman v. Chapel Hill, 161 F.3d 782, 788 (4th Cir. 1998)* (holding a police officer need not actually detect the presence of an object in a suspect's hands before firing) (quotations omitted). Though what transpired was unfortunate, the court believes that a reasonable officer possessing the same information which Kibler possessed

would have believed that the force used was lawful under the circumstances.

The foregoing analysis as to the use of force applies equally to the claim of unconstitutional deprivation of necessary medical attention, as the factual considerations underlying this claim are more fully set out *infra*. In that factual recitation and the legal analysis as to use of force, the court must likewise conclude as to the medical deprivation claim that no unconstitutional deprivation of Milstead's rights occurred.

B. GROSS NEGLIGENCE RELATING TO USE OF DEADLY FORCE

Gross negligence is a state court claim brought in the complaint under pendent jurisdiction. Pendent jurisdiction exists where "different claims of law 'derive from a common nucleus of operative fact." *See Painter v. Harvey, 863 F.2d 329, 332 (4th Cir. 1988)* (citing *United Mine Workers of America v. Gibbs, 383 U.S. 715, 725-26, 16 L. Ed. 2d 218, 86 S. Ct. 1130 (1966)).*

If the Fourth and Fourteenth Amendment claims are decided in favor of the defendants on their motion for summary judgment, the state law claims should also be dismissed. However, the court has discretion to address state law claims even where all federal claims are disposed of in favor of the defendants, and the "balance between judicial efficiency and comity is struck in favor of the federal court's disposition of the state claims." *McLenagan, 27 F.3d at 1009.*

Even if the federal claims were not dismissed, the defendants are protected by sovereign immunity from negligence claims, unless they were grossly negligent. *See id.* Gross negligence is defined as "the absence of slight diligence, or the want of even scant care." *Id.* "It is that degree of negligence that 'shows an utter disregard of

prudence amounting to complete neglect of the safety of another.'" *Id.* The cumulative effect of several acts when taken and considered together under the facts and circumstances of the case may constitute gross negligence. *See Ferguson v. Ferguson, 212 Va. 86, 181 S.E.2d 648, 652 (Va. 1971).* Additionally, a plaintiff may still recover under gross negligence even if he contributed to the accident so long as the negligence of the defendants was the proximate cause which directly produced the accident while the plaintiff's negligence was a remote cause. *See Clohessy v. Weiler, 250 Va. 249, 462 S.E.2d 94, 97 (Va. 1995).*

In hindsight, the defendants made errors upon arriving at the scene of the crime. First, a trained officer in firing his gun missed the intruder not once, but four times from a close range. Then the defendants retreated from the residence, leaving Milstead stranded and unarmed with the intruder and his loaded gun. Milstead warned the defendants that the intruder was getting more ammunition and then attempted to leave the house. Without warning and without ascertaining whether Milstead possessed a gun, Kibler fired a fatal shot to the chest despite knowing that innocent victims were inside the home.

However, Milstead also contributed to this series of blunders by calling for the defendants to enter the house, then immediately releasing Ramey before the police could secure Ramey. This act put both the officers and Milstead in an extremely dangerous position, particularly when the offices were unable to ascertain clearly who was the intruder. The officers did not leave the scene altogether, but instead set up posts outside the house in an effort to stop the intruder in case he exited the residence. In considering the facts in hindsight, it is possible to conclude that the officers were negligent. However, after listening to the 911 tape, it is apparent that the officers were performing their duties to the best of their abilities in the intense war zone that had come about once Milstead freed Ramey. The court cannot find that the

defendants were acting in a utter disregard of prudence for the safety of Milstead.

C. GROSS NEGLIGENCE RELATING TO MEDICAL ASSISTANCE

The defendants also were not grossly negligent in obtaining medical assistance for Milstead. The same legal standard of gross negligence applies to medical assistance as it does to excessive use of force.

Upon receiving Milstead's 911 call, the dispatcher at the Emergency Operations Center called for a rescue squad. Everyone from the dispatcher to the defendants and anyone else who responded to the call were aware that the incident involved potentially serious injuries, and immediate arrangements were made for emergency medical assistance, which would be available on the scene as soon as it was secure. Further, almost immediately after Milstead was shot, Proctor conveyed an additional request for medical assistance to the EOC dispatcher.

After Kibler fired, Milstead fell on the deck next to the door and directly in the line of fire for anyone firing from inside the house. Milstead informed Kibler that the intruder was still inside, the same intruder who Kibler believed had stabbed a pregnant woman and had shot her companion. Ramey continued shouting and threatening the officers until he shot himself in the head. None of the officers heard the shot so they were unaware of his demise and still considered the area unsecure. The officers' training taught them that they needed to wait until the scene was secure, or at the very least until enough backup was on the scene that an officer could be covered while retrieving Milstead.

Proctor and Wetzel were unable to provide the assistance necessary to safely remove Milstead. Wetzel was guarding one door of the residence and Kibler the other. Proctor had

lost his glasses, initially thought he had been shot, and despite this, was still attempting to cover the back of the house. Had Wetzel or Proctor left their positions, no one could have prevented Ramey from exiting the house unobserved through the glass doors or windows, thereby becoming a greater threat to fire upon the officers. The defendants needed to maintain their thin perimeter as a minimal safeguard until more help arrived.

After help arrived, Kibler requested to recover Milstead and was still ordered to wait until the TAC Team secured the area. Despite being told to wait, Kibler retrieved Milstead by himself, thereby exposing himself to potential fire from inside the house. After retrieving Milstead from the porch, Kibler and other officers proceeded to put together a makeshift stretcher out of wood and cardboard found in the area. They carried Milstead away from the house to the road and to the T-intersection to meet the rescue squad. In his deposition, Lieutenant Rinker testified that as soon as he saw Milstead being carried from the house, he radioed the dispatcher and asked for the rescue squad to be sent in from the staging area. From that point forward, the only delay was the time that it took for the rescue squad to arrive at the scene from its staging point two miles away. That delay can not be attributable to any of the three defendants.

Based on these facts, no evidence exists proving that the defendants exhibited any degree of negligence and much less does it show "an utter disregard of prudence amounting to complete neglect for the safety of another." *McLenagan, 27 F.3d at 1009.* The officers clearly were not grossly negligent in securing medical care for Milstead. As a consequence, the court grants the defendants' motion for summary judgment on this gross negligence claim.

III.

The demise of Mark Milstead was truly a tragedy. As evident from the 911 tape, the officers on the scene had only

seconds to ascertain what was occurring. The only information they had been given before arriving at the Milstead residence was that a man and a pregnant woman had been shot and that the intruder had reentered the house. Other than gender, the officers had no information regarding the descriptions of the intruder or the victims. Immediately upon the officers entering the house, a gun was pointed at them. The officers quickly retreated while Ramey tauntingly shouted threats at them. Milstead burst through the door and Kibler reacted by shooting him. Under the chaos of the situation, this court finds that a reasonable police officer possessing the same information Kibler possessed would have believed the force used was lawful under the precedents of the Fourth Circuit. As unfortunate as the demise of Milstead is, the 911 tape indicates that the officers on the scene performed the best they could under a confusing, threatening, and chaotic situation. Accordingly, this court overrules the plaintiff's objection and adopts the Magistrate Judge's Report and Recommendation granting summary judgment for the defendants.

An appropriate order this day shall issue.

ENTERED: s

James H. Michael, Jr.

Senior United States District Judge

3/30/00

Date

FINAL ORDER

JUDGE JAMES H. MICHAEL, JR.

The court referred the above-captioned case to the presiding United States Magistrate Judge for proposed findings of fact and recommendation, subject to review by this court, on the dispositive issues in the case. On November 24, 1999, the Magistrate Judge filed his Report and

Recommendation advising the court to deny the plaintiff's motion for summary judgment and grant the defendants' motion for summary judgment on all counts.

The plaintiff filed an objection to the Report and Recommendation on December 3, 1999, and the defendant filed a response to the objection on December 15, 1999. Under *28 U.S.C. § 636*(b)(1)(B)&(C), this court "shall make a de novo review determination of those portions of the report . . . to which the objection is made." After a thorough examination of the plaintiff's objection, the supporting memoranda, the applicable law, the 911 tape, the documented record, and the Report and Recommendation, this court overrules the plaintiff's objection. For the reasons stated in the accompanying Memorandum Opinion, it is this day

ADJUDGED AND ORDERED that:

(1) The result reached in the Magistrate Judge's Report and Recommendation shall be, and it hereby is, ADOPTED;

(2) The plaintiff's December 3, 1999 objection to the Report and Recommendation of the United States Magistrate Judge shall be, and it hereby is, OVERRULED;

(3) The defendants' October 15, 1999 motion for summary judgment shall be, and it hereby is, GRANTED.

(4) The Clerk of the Court is hereby directed to strike the present case from the docket of this court.

The Clerk of the Court is hereby directed to send a certified copy of this Order to the Magistrate Judge and to all counsel of record.

ENTERED: s

James H. Michael, Jr.

Senior United States District Judge

3/30/00

----------Footnotes----------

n1 The complaint does not reveal this fact, but plaintiff's memorandum states that Ramey had been stalking and threatening Cardwell for some time after she had broken off her relationship with Ramey.

n2 *28 U.S.C. § 1343* grants original jurisdiction to district courts for certain actions to recover damages for injuries or because of deprivation of rights. § 1343(a)(3) specifically grants jurisdiction "to redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States."

42 U.S.C. § 1983 imposes civil liability on any person who under color of State law causes any citizen to be deprived of rights under the Constitution or laws and creates a private cause of action for the citizen whose rights are thus violated.

§ 1988 allows a court to award attorney's fees and expert fees in an action brought under § 1981 or 1983, *inter alia*.

CIVIL ACTION NO. 98-0075-H

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF VIRGINIA, HARRISONBURG DIVISION

MATTHEW MILSTEAD, Administrator of the Estate of MARK MILSTEAD,
Plaintiff,

v.

CHAD KIBLER, et al., Defendants.

April 19, 1999, Decided

April 19, 1999, Filed

COUNSEL:
For MATTHEW MILSTEAD, plaintiff: James Roscoe Tate, David Bafumo, TATE & BYWATER, LTD., VIENNA, VA.

For CHAD KIBLER, SCOTT PROCTOR, LESTER WHETZEL, defendants: Mark Dudley Obenshain, WHARTON, ALDHIZER & WEAVER, PLC, HARRISONBURG, VA USA.

JUDGES:
James H. Michael, Jr., Senior United States District Court.

OPINIONBY:
James H. Michael, Jr.

OPINION:

MEMORANDUM OPINION

JUDGE JAMES H. MICHAEL, JR.

This matter comes before the court on defendants' objections to the March 18, 1999 Report and Recommendation of United States Magistrate Judge B. Waugh Crigler. n1 The Magistrate Judge's Report recommends denying defendants' motion to dismiss and granting leave to plaintiff to amend Count II of his complaint.

For the reasons stated below, the court adopts the Magistrate Judge's recommendations that the motion to dismiss be denied and that plaintiff be granted leave to amend his complaint. The court agrees with the Magistrate Judge that, at this stage, with only limited information as to the facts and circumstances underlying plaintiff's claims, the court cannot determine whether defendants' actions were reasonable and, therefore, whether defendants are entitled to qualified immunity from liability for plaintiff's claims.

I.

On October 5, 1998 plaintiff Matthew Milstead ("Matthew") filed a complaint against defendants Chad Kibler, Scott Proctor, and Lester Whetzel, invoking federal jurisdiction pursuant to *28 U.S.C. § § 1343* and 1367, *42 U.S.C. § § 1983* and 1988. n2 In Count I, Matthew alleges defendants violated his brother Mark Milstead's Fourth and Fourteenth Amendment rights by using deadly force. In Count II, Matthew claims that defendants' negligence in their use of deadly force caused Mark Milstead's death. In Count III, Matthew alleges defendants deliberately denied medical treatment to his brother, proximately causing his death. Plaintiff seeks ten million dollars in compensatory damages.

Defendants answered the complaint on November 4, 1998, along with their motion to dismiss or for summary judgment. Defendants admit that they are police officers, that they were acting under color of law at the time of the incident involving Mark Milstead (Mark), and that one of the

defendants shot the deceased. However, defendants deny liability. The parties submitted briefs on defendants' motion to dismiss or for summary judgment and the Magistrate Judge heard argument on that motion on January 12, 1999.

The facts, as described in the complaint, can be summarized as follows. On Friday night, October 25, 1996, Mark Milstead and his pregnant fiancee Jill Cardwell were attacked by an intruder at their residence in Shenandoah County. The intruder, Steven Ramey, n3 shot and killed Cardwell as she slept. A gunfight between Mark and Ramey ensued. After Ramey fled, at 12:14 a.m. on October 26, 1996, Mark called 911. During the call, Ramey returned and the struggle resumed.

Defendants, two of whom are deputy sheriffs with Shenandoah County (Kibler and Proctor) and one of whom is a police officer for the Town of Woodstock (Whetzel), responded to the scene at 12:27 a.m. Two of the defendants entered the residence and saw Ramey and Mark struggling. Mark alerted these two officers that Ramey had a gun. Ramey broke away from Mark and aimed his gun at defendants, prompting one of them to fire at him four times, without effect. The two defendants inside the residence then exited leaving Mark alone with Ramey. After the three defendants had positioned themselves outside the residence, Mark shouted "he's getting more ammo" and fled out the front door. One of the defendants immediately fired upon Mark as he exited his residence, unarmed. Ramey killed himself using his gun inside the residence.

About 20 minutes elapsed after Mark was shot and before any request was made by the officers for medical assistance. Another 45 minutes passed before Mark Milstead arrived at the hospital, where he died about one hour after his arrival.

Under Rule 12(b)(6) of the Federal Rules of Civil Procedure, "failure to state a claim upon which relief can be granted" provides grounds for dismissal. For purposes of a

Rule 12(b)(6) motion, all factual allegations in the plaintiff's complaint must be accepted as true. *See Estate Constr. Co. v. Miller & Smith Holding Co., 14 F.3d 213, 217-18 (4th Cir. 1994).* The plaintiff's complaint should be construed liberally, and ought not be dismissed unless it is apparent that the plaintiff "would not be entitled to relief under any facts which could be proved in support of [his] claim[s]." *Schatz v. Rosenberg, 943 F.2d 485, 489 (4th Cir. 1991); Conley v. Gibson, 355 U.S. 41, 45-46, 2 L. Ed. 2d 80, 78 S. Ct. 99 (1957); Beaudett v. City of Hampton, 775 F.2d 1274, 1278 (4th Cir. 1985), cert. denied, 475 U.S. 1088, 89 L. Ed. 2d 729, 106 S. Ct. 1475 (1986).* n4

In this case, plaintiff relies on the Fourth and Fourteenth Amendments of the United States Constitution as the source of the specific constitutional rights allegedly violated by defendants. Claims such as these, alleging use of excessive force or mistaken identity on the part of police officers, are usually analyzed under a Fourth Amendment, objective "reasonableness" standard, balancing the intrusion on constitutional rights against the governmental interests. *See Graham v. Connor, 490 U.S. 386, 395-96, 104 L. Ed. 2d 443, 109 S. Ct. 1865 (1989).* The Fourth Amendment limits an officer's use of deadly force to "those situations, among others, where he has probable cause to believe that a suspect poses a threat of serious physical harm to the officers or others." *Slattery v. Rizzo, 939 F.2d 213, 216 (4th Cir. 1991)* (citing *Tennessee v. Garner, 471 U.S. 1, 11, 85 L. Ed. 2d 1, 105 S. Ct. 1694 (1985)).* The Fourteenth Amendment also creates rights relevant to plaintiff's claims. "The Due Process Clause of the Fourteenth Amendment requires public officials to provide medical care to pretrial detainees who are injured in the course of arrest." *Rowland v. Perry, 41 F.3d 167, 174 (4th Cir. 1994).* In addition, the Fourth Amendment only applies to state officials via the Fourteenth Amendment. *See, e.g., McLenagan v. Karnes, 27 F.3d 1002, 1006 (4th Cir. 1994).*

The crucial question in analyzing plaintiff's claims and defendants' motion to dismiss is whether or not the defendants' actions were objectively reasonable. Applying the Fourth Amendment objective reasonableness analysis "requires careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight." *Graham, 490 U.S. at 396.*

The same objective reasonableness standard used to determine whether defendants' use of force was excessive is used to determine whether qualified immunity shields the defendants from liability. *See Rowland, 41 F.3d at 173.* A police officer sued in his or her individual capacity has qualified immunity unless he or she knew or should have known that his or her actions violated established constitutional rights. *See Hughes v. Blankenship, 672 F.2d 403 (4th Cir. 1982), Harlow v. Fitzgerald, 457 U.S. 800, 818, 73 L. Ed. 2d 396, 102 S. Ct. 2727 (1982).* Even a mistake, if based on a "sufficient probability" will not subject officers to liability for damages resulting from the mistake. *Hill v. California, 401 U.S. 797, 804, 28 L. Ed. 2d 484, 91 S. Ct. 1106 (1971).* If the mistake is one in identifying the suspect, officers are entitled to do whatever they would have been allowed to do had they been correct in their identification. *See id.* "[Section] 1983 does not purport to redress injuries resulting from reasonable mistakes." *McLenagan, 27 F.3d at 1008.*

Motions to dismiss claims of excessive use of force have been granted based on the qualified immunity doctrine where the claim is conclusory and without factual support or where the use of force was clearly warranted. *See, e.g. Davis v. Bayless, 70 F.3d 367 (5th Cir. 1995), Banks v. Town of Culpeper, 1995 U.S. Dist. LEXIS 1512, 1995 WL 48267 (W.D.Va. 1995).* A defendant pleading qualified immunity

may be entitled to dismissal "before the commencement of discovery," if plaintiff fails to allege a violation of clearly established law. *Behrens v. Pelletier, 516 U.S. 299, 306, 133 L. Ed. 2d 773, 116 S. Ct. 834 (1996).* Thus, the qualified immunity defense may allow defendants to avoid not only trial, but the "burdens of such pretrial matters as discovery." *Id. at 308.* The court must give the qualified immunity defense a "hard look" at the dismissal stage. *See McVey v. Stacy, 157 F.3d 271, 275 (4th Cir. 1998).*

Defendants do not contest that the constitutional rights which plaintiff alleges they violated were clearly established at the time of the incident in question. *See, e.g., id. at 276.* Instead, defendants assert that the complaint makes all the facts clear enough to allow the court to find without further evidence that qualified immunity shields defendants from plaintiff's claims. But the Fourth Circuit has held that when there is a genuine issue of material fact as to whether a reasonable police officer would have used the level of force actually used, summary judgment is precluded. *See Rowland, 41 F.3d 167 (4th Cir. 1994).* In order for the court to make an objective appraisal of the reasonableness of the force used, there must be some evidence of the "officer's perceptions at the time of the incident in question." *See id. at 173.* Only then can the court view the "totality of the circumstances," and assess the objective reasonableness of the force used. *See id.*

Defendants claim that the Magistrate Judge failed to specify what factual issues needed to be resolved before the qualified immunity defense could be accepted. However, it is clear from the record as a whole that there is a genuine issue of material fact as to what the officers' perceptions were at the time of the incident. Indeed the only living witnesses who can attest to the incidents that took place on October 25 and 26, 1996 are the three defendants. No affidavits, depositions, or other indications of the officers' perceptions that night have been supplied in support of the motion to dismiss or for summary judgment. Accepting the facts as described in the

complaint, it is possible that defendants should have perceived that Mark Milstead posed no threat, was not armed, and should not have been confused with Ramey, the attacker who posed the real threat. The complaint allows for the inference that Mark was easily recognizable when he exited the house and therefore no reasonable officer would have fired upon him.

Defendants also argue that where a complaint is as specific as this one, and makes clear that the defendants faced exigent circumstances, no claim for excessive use of force or mistaken identity can survive a motion to dismiss which raises qualified immunity as a defense. Although courts should not "second-guess the split-second judgment of a trained police officer merely because that judgment turns out to be mistaken," the court cannot forego analyzing "the particular circumstances confronting" the officers just because qualified immunity is raised as a defense. *See McLenagan, 27 F.3d at 1007-08.* Even in *McLenagan* +--a case which defendants reasonably characterize as similar to the case at bar because it involved police officers shooting a person they mistakenly took for an armed suspect under circumstances in which quick action was warranted--the court considered the perceptions of the officers at the time in making its objective reasonableness analysis.

Because the objective reasonableness analysis must take into account the officers' perceptions as part of the totality of the circumstances, the court cannot adequately perform that analysis at this stage. Therefore, the court must deny the motion to dismiss Count I of plaintiff's complaint, alleging violation of Mark's Fourth and Fourteenth Amendment rights.

Plaintiff's negligence claim also must survive the motion to dismiss, if plaintiff is given leave to amend it so that gross negligence is alleged. Negligence is a state law tort, properly brought pursuant to this court's supplemental jurisdiction.

Defendants claim that sovereign immunity protects them from liability for negligence as alleged in Count II.

Virginia courts have established a four-factor test for determining whether an act is protected under the sovereign immunity doctrine. *See Colby v. Boyden, 241 Va. 125, 400 S.E.2d 184, 186 (Va. 1991).* The four factors are (1) the function the employee was performing at the time; (2) the government interest and involvement in that function; (3) the control and direction by the government over that function; and (4) the degree to which the employee was exercising discretion and judgment. *See 400 S.E.2d at 186-87.* However, even if sovereign immunity applies under the four-factor test, plaintiff can still prevail if he can show gross negligence by defendants. *See id. at 187.* Virginia courts define gross negligence as "the 'heedless, palpable violation of rights showing an utter disregard of prudence,' and the 'absence of slight diligence or the want of even scant care.'" *Phillips v. Commonwealth of Virginia, 25 Va. App. 144, 487 S.E.2d 235, 239 n. 3 (Va. Ct. App. 1997)* (citations omitted). If plaintiff can prove, as alleged in the complaint, that defendants shot on sight the very man whom they were sent to protect, when they should have known that he was unarmed and not the suspect, that may satisfy the gross negligence requirement. Because plaintiff's constitutional claim survives the motion to dismiss, and because plaintiff intends to amend his complaint to allege gross negligence explicitly so that sovereign immunity is not a bar, the state law negligence claim survives as well.

Next, defendants argue that Count III should be dismissed because there is no Virginia law claim for denial of medical care. Whether Count III is construed as simply an additional claim of negligence, or as a Fourteenth Amendment claim, as described in *Rowland*, it also survives defendants' motion to dismiss. If Count III is another negligence claim, it survives for the same reasons discussed with reference to Count II. If Count III reiterates plaintiff's Fourteenth Amendment claim,

the reasoning above with reference to Count I applies. Therefore, the motion to dismiss will be denied as to Count III as well.

III.

For the foregoing reasons, the court will deny the motion to dismiss or for summary judgment. The complaint asserts the necessary elements of both a Section 1983 claim and a state-law negligence claim. The court will also adopt the Magistrate Judge's recommendation that plaintiff be granted leave to amend Count II to specifically allege gross negligence.

An appropriate order shall this day issue.

ENTERED: James H. Michael, Jr.

Senior United States District Court

April 19, 1999

Date

ORDER

JUDGE JAMES H. MICHAEL, JR.

For the reasons stated in the accompanying memorandum opinion, it is this day

ADJUDGED AND ORDERED

that the Magistrate Judge's March 18, 1999 Report and Recommendation shall be, and it hereby is, adopted in full; defendants' March 26, 1999 Objections shall be, and they hereby are, overruled. Defendants' November 4, 1998 Motion to Dismiss or for Summary Judgement shall be, and it hereby is, DENIED. Plaintiff shall have ten (10) days from the date this order is entered in which to amend Count II of his complaint.

The Clerk of the Court hereby is directed to send a certified copy of this Order to all counsel of record and to Magistrate Judge Crigler.

ENTERED: James H. Michael, Jr.

Senior United States District Judge

April 19, 1999

Date

----------Footnotes----------

n1 The court referred this action to the United States Magistrate Judge pursuant to *28 U.S.C. § 636*(b). This court must now undertake de novo review of the case under *Orpiano v. Johnson, 687 F.2d 44, 48 (4th Cir. 1982).*

n2 *28 U.S.C. § 1343* grants original jurisdiction to district courts over actions to recover damages for injuries or because of deprivation of rights. Section 1343(a)(3) specifically grants jurisdiction "to redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States."

42 U.S.C. § 1983 imposes civil liability on any person who under color of State law causes any citizen to be deprived of rights under the Constitution or laws and creates a private cause of action for the citizen whose rights are thus violated.

§ 1988 allows a court to award attorney's fees and or expert fees in an action brought under § 1981 or 1983, *inter alia.*

n3 The complaint does not reveal this fact, but plaintiff's memorandum states that Ramey had been stalking and

threatening Cardwell for some time after she had broken off her romantic relationship with Ramey.

]n4 Defendants styled their motion as one, in the alternative, for summary judgment pursuant to Rule 56. The court finds summary judgment inappropriate at this stage, because no discovery has been conducted, there are no exhibits or attachments to the briefs on the motion, and this case involves questions of material fact for which evidence is needed. Accordingly, the court construes the motion only as a motion to dismiss.

No. 00-1539

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MATTHEW MILSTEAD, Administrator of the Estate of Mark Milstead, Plaintiff-Appellant,

v.

CHAD KIBLER; SCOTT PROCTOR; LESTER WHETZEL,

Defendants-Appellees.

April 10, 2001

ORDER

The appellant has filed a petition for rehearing. The Court denies the petition for rehearing.

For the Court,

S/Patricia S. Connor

Text of Constitutional and Statutory Provisions Involved

United States Constitution

AMENDMENT IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

AMENDMENT VII

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

AMENDMENT XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

United States Code

Title 42, § 1983
Civil action for deprivation of rights.

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Federal Rules of Civil Procedure

RULE 56
Summary Judgment

(a) For Claimant. A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in the party's favor upon all or any part thereof.
(b) For Defending Party. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without

supporting affidavits for a summary judgment in the party's favor as to all or any part thereof.

(c) Motion and Proceedings Thereon. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(d) Case Not Fully Adjudicated on Motion. If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) Form of Affidavits; Further Testimony; Defense Required. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to

interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

(f) When Affidavits are Unavailable. Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(g) Affidavits Made in Bad Faith. Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused the other party to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

No. 01-50

SUPREME
FILED
AUG 6 2001

In The

Supreme Court of the United States

MATTHEW MILSTEAD, Administrator of the Estate of Mark Milstead,

Petitioner,

v.

CHAD KIBLER; SCOTT PROCTOR; LESTER WHETZEL,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF THE CASE

Just after midnight on October 26, 1996, three police officers arrived at a house in rural Shenandoah County, Virginia. The police dispatcher reported that a caller said he had been shot in the throat and his girlfriend stabbed. (J.A. 556, 601). The officers immediately found signs confirming that a violent crime was in progress--blood on a vehicle and on the steps. (J.A. 127, 247). In response to calls for help from inside, one officer kicked the door open, and immediately encountered a gun pointed at his face. (J.A. 256). He fired his weapon, apparently without effect, fell backwards and sought cover. (J.A. 256-257). Someone inside yelled threats at the officers and seconds later a man crashed through the metal storm door at a run in the direction of an officer standing at the corner of the house twelve to fifteen feet away. (J.A. 163, 507). Shenandoah County Sheriff's Deputy Chad Kibler, confronted with the necessity of making a split-second decision, pulled the trigger and shot Mark Milstead[1] twice in the chest. (J.A. 181-182). Milstead died from the injuries.

Information gathered after the shooting revealed that Milstead was the homeowner, and that an armed intruder, Steven Ramey, broke into the house he shared with Jill Cardwell. (J.A. 86). Ramey previously had been engaged in a romantic relationship with Cardwell, which ended when Cardwell left Ramey for a former boyfriend--Milstead. That night, after entering the house, Ramey shot and killed Jill Cardwell, and a gunfight ensued between Milstead and Ramey. (J.A. 86). During that fight, Ramey shot Milstead once in the neck, and Ramey was shot six times. (J.A. 86).

After the initial gunfight, Ramey left the house, and at 12:14 a.m. on October 26, Milstead placed an emergency 911 call to the Shenandoah County Emergency Operations Center (EOC). (J.A. 86, 556). During the 911 telephone call,

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[1]Milstead and his survivor are referred to herein as "Milstead."

Ramey returned to the house and the struggle resumed. (J.A. 86, 87, 556). At approximately 12:27 a.m., while the fight between Ramey and Milstead continued, Shenandoah County Sheriff's Deputies Kibler and Proctor, along with Woodstock Town Police Officer Whetzel arrived at the scene. (J.A. 87). The 911 tape and the testimony of the officers show exactly what the officers knew about the situation before they arrived at the scene.

The gist of Milstead's claim on appeal is that despite the report of a shooting, blood on the van and on the steps, the gun pointed at Proctor, the shots fired, the screamed threats directed at officers from inside the house, and a man crashing through the door of the house at a run in the direction of Kibler who was less than fifteen feet away, Proctor and Kibler should have willingly "taken a bullet" in order to avoid civil liability. This is precisely the kind of choice which this Court has acknowledged that police do not have to make.

The undisputed evidence in this case shows that the three officers had probable cause to believe that one or more of the subjects they encountered posed a threat of serious physical harm to them or to others. Probable cause existed at all times up to and even after the shooting. This is dispositive of the Fourth and Fourteenth Amendment "use of deadly force" claims. The fact that Kibler was mistaken as to whether Milstead actually posed such a threat does not change the result. His decision to fire was a reasonable response to the situation facing him at the time. The objective reasonableness of their actions requires that they be afforded the protection of qualified immunity.

Milstead's factual recitation provides the backdrop and the foundation for each of his arguments. The recitation, however, fails to reflect the facts found in the record. Two primary examples, upon which Milstead repeatedly relies throughout his argument are (1) the claim that Proctor was able to immediately determine who was the innocent victim and who was the armed intruder; and

(2) that Kibler shot Milstead even though Milstead's hands were in plain view and he saw that he was unarmed. Neither is reflected in the record. These assertions are cobbled together from "grains of truth." Proctor did see two people when he entered the house, and one did point a gun at him. (J.A. 253-256). Milstead's hands were not clearly visible and Kibler did not see that he was unarmed. (J.A. 187). There was one dim light behind Milstead, and Kibler could only approximate how his hands were held--near his chin, as one might hold a gun with both hands--and he *did not* see whether he had anything in his hands. (J.A. 221-222). Further, because of the speed with which Milstead exited the house, crashing through the door and running in Kibler's direction, he had no opportunity to inquire or warn before deciding to fire. (J.A. 226).

The qualified immunity standard established by this Court has been carefully crafted to achieve the proper balance between the interest in preventing and compensation for constitutional violations and the interest in avoiding the over-deterrence of the exercise of independent judgment by law enforcement officers. The application of qualified immunity here works no injustice.

ARGUMENT

This case is indeed unusual in that the testimony of the officers about what happened at the scene is supplemented by the extraordinary 911 tape which caught on audiotape the events which occurred after the 911 call was made. (J.A. 545, 600-601). That tape is instructive, because it is an objective account of what happened on the night of the shooting. Unlike most cases of this nature, it is not necessary to rely upon the account of events reported by officers.

The tape clearly shows the rapidity with which events unfolded after the police officers arrived on the scene. Armchair analysis of the events may result in

detailed and sterile descriptions of the events. Descriptions which suggest that there was time for deliberation, consultation and carefully planned action. The tape exposes the fallacy of this kind of analysis.

The record also exposes the erroneous factual assertions upon which Milstead relies. Milstead attempts to portray Deputies Kibler and Proctor as a pair of bumbling cowards. In fact, these two officers showed great bravery in their actions on October 26. The officers were aware that at least one person was armed, and yet when they heard someone inside the house screaming for help, the officers kicked in the door, ready to face the unknown, and willingly placing themselves in harm's way.

Milstead asserts as fact that Proctor and Kibler knew before arriving at the scene that the tactical situation they would face consisted of "two innocent victims" being attacked by a single armed intruder. In fact, they knew no such thing. The officers knew little more than that a violent fight had occurred. (J.A. 243-244, 556, 601). They did not know whether it was a domestic matter, whether drugs or alcohol were involved, whether it was a breaking and entering, who was the initial aggressor, how many people were armed, or who might be hostile to the officers. (J.A. 245). Notwithstanding the limited information they possessed, the officers made what surely was one of the most difficult decisions of their lives by deciding to kick in the door. (J.A. 251-252). They did their duty.

After the door was kicked in, Milstead says that Proctor immediately learned all of the necessary tactical information he may have lacked before. He says that since Proctor knew that there was an "innocent victim" in the house, he immediately identified and distinguished between the two men he saw inside. In fact, Proctor did not know or understand that there was an "innocent victim" inside. (J.A. 252-255). All he was able to determine in the instant he was inside was that there was someone pointing a gun at his face.

Milstead then launches his assault upon Kibler's actions. Kibler did get into the doorway of the house, but when Proctor began backing and firing, Kibler was forced out of the doorway. (J.A. 148-150). Kibler immediately took up his position at the corner of the house–twelve to fifteen feet from the door. (J.A. 163, 507). Milstead says Kibler positioned himself under cover, that he never faced any danger, and that he clearly saw that the person exiting the house was not armed. These assertions are detached from the evidence and reality.

When someone crashed through the metal storm door running in Kibler's direction, he had but an instant to decide whether it was friend or foe. He knew that if it was a foe, he had to fire immediately or be prepared to die. It was the middle of the night, there was one dim bulb burning behind the person coming through the door. Kibler could see the general location of his hands–in the area of his chin, but he could not tell whether he had a gun. (J.A. 187). Kibler explained that he knew that the 911 caller had been shot in the throat by someone, and did not believe that someone who had been shot in the throat would crash through the door. (J.A. 226-227). Kibler saw Proctor fire his weapon yelling "man with a gun," and fall backwards out of the doorway as if he had been shot. (J.A. 154-155). He made a split-second decision and fired. From the comfort of a law office it is easy to say that Kibler made the wrong choice. It was not quite as simple on October 26. It is not a choice upon which Kibler can be held liable.

I. SUMMARY JUDGMENT BELOW WAS BASED ON THE UNDISPUTED FACTS, NOT ON MISTAKEN APPLICATION OF FOURTH AMENDMENT JURISPRUDENCE

Count I of the Amended Complaint asserts that the "use of deadly force against Milstead, when he was unarmed and did not pose a threat of death or grievous bodily harm to any of the defendants or others, violated

Milstead's rights as guaranteed by the Fourth and Fourteenth Amendments to the United States Constitution." Milstead argues that the Fourth Circuit is mistaken in its application of the teachings of Graham v. Connor, 490 U.S. 386, 397 (1989).

Milstead argues that as is evidenced by its decision in Greenridge v. Ruffin, 927 F.2d 789 (4th Cir. 1991), the Fourth Circuit is among a large majority of Circuits which erroneously conclude that the analysis of the "reasonableness" of an officer's particular use of force focused on the reasonableness of the conduct "at the moment" when the decision to use certain force was made. Below, Milstead argued that, in determining reasonableness, the chain of events ought to be traced backward to any earlier misconduct or mistake by the officer. Here, in addition to suggesting that Milstead's death could be traced backwards to mistakes made earlier by the officers, Milstead also argues that in evaluating Kibler's use of force, the "totality of the circumstances" considered by the court should include the perceptions of his partner, Proctor.

In Greenridge, the Fourth Circuit actually affirmed the exclusion of evidence that a police officer allegedly violated standard police procedure prior to a shooting on the grounds that events which occurred before were not probative of the reasonableness of the officer's decision to fire the shot. 927 F.2d at 792.

In Graham, this Court held that the proper application of the "objective reasonableness" test "requires careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight." Graham, 490 U.S. at 396.

The reasonableness of the officer's actions "must be judged from the perspective of a reasonable officer *on the scene*, rather than with the 20/20 vision of hindsight." Most

significantly, the Court further elaborated that "reasonableness" meant the "standard of reasonableness *at the moment*." Id. (emphasis added).

This Court seemed to have relied upon the "split-second judgments" that were required to be made and focused on the reasonableness of the conduct "at the moment" when the decision to use certain force was made. Applying this reading to the present case, the Graham decision contradicts Milstead's argument that, in determining reasonableness, the chain of events ought to be traced backward to the officer's misconduct.

Applying these principles to the facts in this case, there is no basis for contending that the courts below have misapplied the "objective reasonableness test" in this case. Officers are entitled to qualified immunity for their respective roles in the shooting of Milstead, notwithstanding the claim that Milstead was mistakenly shot by Kibler. The claims that Milstead was unarmed and did not pose a threat of death or grievous bodily harm to any of the defendants, are quite irrelevant for purposes of the constitutional analysis. This assertion of fact is one made by Milstead with the benefit of 20/20 hindsight, specifically for the purpose of second guessing the reasonableness of the officers' actions at the time. This is precisely the type of exercise against which the doctrine of qualified immunity is intended to protect.

Everyone--Mark Milstead included--made split-second judgments on the night of October 26. (J.A. 680). Armchair analysis now reveals that a different judgment by any of the actors at any stage might have altered the final outcome of that night. Id. As for Mark Milstead, the District Court did comment upon his critical choices and split-second judgments. First, it was Mark Milstead, who yelled at the deputies to come in the house. Id. Almost immediately after Proctor kicked the door in, Milstead

simply jumped off Ramey and yelled that he had a gun. Id. Immediately, Ramey came up with a weapon and pointed it at Proctor. Id. All of these events took a split second.

Utilizing the same hindsight which Milstead seeks to have the Court apply to this case, it is equally possible to argue that if Milstead had just held onto Ramey until the officers could get into the house, they *would* have been able to assist him in subduing Ramey, and in preventing Ramey from firing at anyone. Milstead made a split-second judgment which, with the benefit of 20/20 hindsight, now can be said was the wrong choice. Milstead's decision to let go of Ramey turned a tense situation into a crisis. His split-second decision should be judged no more or less harshly than those of the officers.

Kibler's decision to fire his weapon must be viewed as police officers would have viewed it. Clearly, a reasonable officer could have believed that it was the suspect coming out of the house, and that he was armed, dangerous and meant to harm the police officers. Clearly, a reasonable officer could have believed that it was necessary to respond with deadly force to Milstead's sudden appearance when he came out of the house without warning, explanation, announcement or a request that they hold their fire.

Although in recounting these events orally or on paper it may be easy to make them sound as if they were slowly unfolding in a manner that provided Kibler and the other officers the luxury of time to confer, deliberate and consider their options before settling on a plan of action, such was not the case here. The EOC/911 tape demonstrates the fallacy of a suggestion that this scene was anything other than volatile and chaotic. It demonstrates the absolute necessity of split-second decision-making by the officers. The tape also buttresses the conclusion that Kibler's actions were objectively reasonable. Based on these facts and viewed from the perspective of the officers, the

shooting "could reasonably have been thought consistent with the rights [the officers] are alleged to have violated." Anderson v. Creighton, 483 U.S. 638 (1987).

The reasonableness analysis requires the application of qualified immunity to the actions of the police officers in this case. The evidence shows clearly that a reasonable police officer could have been justified in believing that the suspect, and even Milstead posed a threat of serious physical harm to them or to others. Similarly, given the circumstances, Kibler's apparent mistake in firing at Milstead was understandable, and was a reasonable response to the situation facing the officers at the time.

In a related argument, Milstead also objects to the Fourth Circuit's application of the "objective reasonableness" test because it has observed that "the objective facts 'must be filtered through the lens of the officer's perceptions at the time of the incident in question.'" Milstead v. Kibler, 243 F.3d 157, 163 (4th Cir. 2001).

Such a perspective serves two purposes. First, using the officer's perception of the facts at the time limits the second guessing the reasonableness of actions with the benefit of 20/20 hindsight. Graham, 490 U.S. at 396. Second, using this perspective limits the need for decision-makers to sort through conflicting versions of the "actual facts, and allows them to focus instead on what the police officer reasonably perceived." Gooden v. Howard County, MD, 954 F.2d 960, 965 (4th Cir. 1992) (*en banc*).

The claims that Milstead was unarmed and did not pose a threat of death or grievous bodily harm to any of the defendants, are quite irrelevant for purposes of the constitutional analysis. The facts must be "filtered through the lens of the officers' perceptions at the time." This assertion of fact is one made by the plaintiff with the benefit of 20/20 hindsight, specifically for the purpose of second guessing the reasonableness of the officers' actions at the time.

II. THE COURT NEED NOT DISCARD ITS QUALIFIED IMMUNITY JURISPRUDENCE

Milstead argues in his brief that this Court should use this case to rewrite the nearly 35 years of case law underlying the doctrine of qualified immunity. Milstead suggests that it is time for this Court to revisit the standards it has established for excessive force cases, specifically to determine whether qualified immunity should be retained, and if so, to delineate its separate function. (Petition, p. 20). Petitioner asks this Court to "grant review to clarify the relationship between the Fourth Amendment standards, with or without qualified immunity, and the summary judgment standards of Civil Rule 56." (Petition, p. 21).

This Court, however, has just addressed and clarified this relationship. See Saucier v. Katz, 121 S.Ct. 2151 (2001). In Saucier, this Court held that a "ruling on qualified immunity requires an analysis not susceptible of fusion with the question whether unreasonable force was used in making the arrest." Id. In fact, the Saucier decision addresses virtually every one of the Petitioner's arguments in favor of granting a writ of certiorari.

Petitioner argues that there has been a misapplication of dicta from this Court's prior decisions which has resulted in a mistaken emphasis by many courts upon "the importance of summary disposition in appropriate cases to vindicate the policies of qualified immunity." (Petition, pp. 19-20). In Saucier, this Court rejected the Petitioner's premise, holding in a Fourth Amendment excessive force case that "[w]here the defendant seeks qualified immunity, a ruling on that issue should be made early in the proceedings so that the costs and expense of trial are avoided where the defense is dispositive. Qualified immunity is 'an entitlement not to stand trial or face other burdens of litigation.'" Saucier, 121 S. Ct. at 2156 (quoting Mitchell v. Forsyth, 472 U.S. 511, 526 (1985)). The direction provided on this issue by the Court in

Saucier is not dicta. Furthermore, it is clear that to the extent that any confusion existed in lower courts, that now has been adequately addressed.

The foundation of Milstead's argument here, as elsewhere, rests upon his characterization of the events of October 26. He argues that if qualified immunity can apply to the facts of this case, it is an unjust doctrine which therefore must be modified or discarded. Aside from the obstacles obvious to discarding a long entrenched and well-developed doctrine of Constitutional law, Milstead faces other obstacles. Principal among his problems, is that the "facts" he recites were properly rejected by the District Court as unsupported by any evidence as has been discussed at great length above. Proctor did not "know exactly who was who;" he did not know whether there was an innocent victim, or if so who it was. Kibler was not actually inside the house, and never had the same view as Proctor. Kibler and Proctor never had an opportunity to confer and exchange information about what each saw. Likewise, Kibler did not see that the person exiting the house had no gun; he did have reasonable grounds to believe that he and the others (the officers and any innocent victims) were in imminent danger of death or great bodily harm; and Kibler was partially behind cover, but that provided little comfort in the face of what he reasonably believed was an armed killer charging at him from less than fifteen feet away.

Without distorting the facts, there is no viable argument that the application of qualified immunity works an injustice here. At least no more injustice than that found in any tragedy, as the Fourth Circuit acknowledged in Belcher v. Oliver, 898 F.2d 32, 35 (4th Cir. 1990):

> We do not for one moment dismiss the pain of these events for those involved. We hold only that their tragic character cannot be ameliorated by efforts to affix constitutional blame where it does not belong.

Id.

CONCLUSION

For the foregoing reasons, this Court should deny Petitioner's petition for a writ of certiorari.

Respectfully submitted, Dated: August 9, 2001

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No. 01-50

In The
Supreme Court of the United States

MATTHEW MILSTEAD,
Administrator of the Estate of Mark Milstead,

Petitioner,

v.

CHAD KIBLER; SCOTT PROCTOR; LESTER WHETZEL,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

REPLY BRIEF FOR PETITIONER

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The respondents' brief in opposition[1] largely is unresponsive to either the questions presented for review or the reasons stated in the petition for certiorari. However, the respondents do raise one matter that is significant to a consideration of review in this case, which is this Court's recent decision in *Saucier v. Katz*, 531 U.S. 991, 121 S. Ct. 2151 (2001). Though we agree that *Saucier* is significant, we disagree with respondents' suggestion (Opp.10-11) that it obviates the need for review in this case.

To the contrary, *Saucier* serves to narrow and focus attention on the reasons why review should be granted in this case. Unlike *Saucier*, this case does not involve a trivial "push or shove"[2] by officers making a lawful arrest. This case involves a violent killing by the police, and it was an intentional killing of an unarmed and innocent person who in fact was the victim that the officers had been dispatched to protect. Also unlike *Saucier*, this case directly presents the question of when the intentional killing by the police of an unarmed and innocent person can be constitutional under the Fourth Amendment.

This Court should answer that question, with more specificity that has been provided by its previous decisions or by the decisions of the courts of appeals, and in the process should resolve the existing conflicts of authority in the lower courts. It is an embarrassment to the rule of law in the United States that no decision of this Court has articulated a specific constitutional standard under the Fourth Amendment to limit the use of deadly force by police officers against the innocent.

1. The petition for certiorari raised four questions for review (*see* Pet.i). Respondents' brief in opposition, in re-arguing the merits of their case (Opp.5-9), completely ignores the divisions of authority that provide the grounds

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1 "Brief in Opposition to Petition for Writ of Certiorari," served on August 9, 2001 (hereinafter cited as "Opp.").

2 *See Saucier*, 121 S. Ct. at 2160 (opinion of the Court, by Kennedy, J.), 2162 (Ginsburg, J., concurring, joined by Stevens and Breyer, JJ.); both *quoting from Graham v. Connor*, 490 U.S. 386, 396 (1989).

for review under the first two questions presented (*see* Pet.15-20). Respondents do not deny the conflicts among lower court authority,[3] and argue only that the decision below was correct, which is not responsive to the range of considerations bearing on this Court's exercise of discretion on certiorari. Respondents also do not deny that the questions presented in this case are of exceptional public importance, particularly in light of recent attention to episodes of deadly police violence against the innocent (*see* Pet.23-26).

2. Respondents' re-argument of their case on the merits also serves to demonstrate the error of the courts below and the ambiguity of the law surrounding the application of summary judgment in such cases, which was the fourth question presented for review by the Petition. This is so because the respondents' case rests critically on arguments of favorable *factual* inference from certain evidence and the disregard of other evidence–a type of argument that could be made to a jury, but one that is entirely out of place as a basis for summary judgment.

Thus, as in the courts below, the respondents here emphasize some of the evidence of record–such as the claimed rapidity of the events as allegedly shown by the sounds on the 911 tape[4] and the officers' subjective

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[3] The respondents' brief cites no court of appeals' decision outside of the Fourth Circuit (*see* Opp.ii), whereas the Petition cited 16 such decisions (*see* Pet.v-vi).

[4] Of course, the objective reality is otherwise. The Virginia State Police's transcript of the 911 tape (JA601-07) shows that at least 20 seconds passed between the shots fired by Officer Proctor and the shots fired by Officer Kibler at Milstead (*see* JA606-07). In such a situation of armed confrontation, 20 seconds is a long time. What was virtually instantaneous was Officer Kibler's decision to fire his weapon twice at the person emerging from the door of the house, before that person, who in fact was Milstead, had time to do anything, or indeed even to turn in Kibler's direction, which itself would not have been a threatening act, to Kibler's admitted knowledge at that moment (*see* JA182-84). As the 911 transcript further confirms, no shots were ever fired at the police officers. Six shots were fired by the police, four at Ramey and two at Milstead, and seventh shot, fired at close range, killed Ramey. This last shot was believed to have been self-inflicted.

misperceptions (*see* Opp.3-5)-and ignore or discount other evidence of record, such as the officers' own testimony about what they saw, both inside the house and at the moment of shooting, the actual locations of the officers as being under cover and under no immediate threat from anyone, and the autopsy findings showing that Mark Milstead was shot from the side, and therefore could not have been advancing on the shooting officer Kibler (*see* Pet.4-8).

Furthermore, as in the courts below, respondents' counsel now attacks the conduct of the innocent victim that the respondents killed, arguing that Milstead did something wrong when he released his hold on the criminal Ramey (*see* Opp.7-8). Here again, we disagree, and draw a different inference from the evidence. Whether viewed from foresight or "20/20 hindsight," we believe that Milstead did exactly the right thing: being faced with two officers with guns drawn and pointed, Milstead needed to do something to indicate that he was not the aggressor, or he may have been killed at that very moment, as these particular officers obviously had better aim when shooting at the innocent than when shooting at the guilty. Milstead's fatal error was the humanitarian act of warning the officers that Ramey was armed, which caused both officers to panic and run away, abandoning Milstead alone in the house with the now-released Ramey. When Milstead attempted to follow the officers' path of retreat, he was killed by Kibler, who was waiting under cover in an ambush position. The truth of this case is that the officers' incompetence and panic are what killed Mark Milstead.

Unlike the respondents, we do not expect this Court to choose between these competing factual inferences from the evidence, or to select out certain items of evidence to weigh more heavily in the balance. But the lower courts should not have done so, either, as this was a decision on summary judgment, without trial. The respondents' arguments here aptly characterize the necessary basis of the decision below, which was to pick and choose among the

facts, make credibility determinations, and weigh some items of evidence over others, and therefore was an erroneous basis for summary judgment against the Petitioner under this Court's ruling decisions on summary judgment standards. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986); *Howlett v. Birkdale Shipping Co.*, 512 U.S. 92 (1994).

That error is made all the more clear by this Court's recent decision in *Saucier*, which focuses the summary judgment process in excessive force cases on ambiguities of *law*, not competing inferences of *fact*, *see Saucier*, 121 S. Ct. at 2156-57. Nevertheless, even though it cites and discusses *Saucier*, respondents' brief in opposition here continues to confuse the qualified immunity and constitutional inquiries[5] and to confuse factual with legal disputes. This provides an early indication to this Court that *Saucier* is not clear enough to provide the needed guidance to the lower courts, and thus strengthens the grounds for granting review in this case.[6]

3. We agree that *Saucier* does narrow the focus of one of the four questions presented for review (question 3), but it does not eliminate that question, given the contrast between the facts of *Saucier* and this case. Under the rationale of *Saucier*, its holding underscores the need for this Court to clarify the legal standards applicable to the Fourth Amendment issues in the instant case of deadly force

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[5] Thus, on page 3 of the brief in opposition, respondents refer to the decision below as being based on qualified immunity, whereas in fact the court of appeals was careful to limit its discussion to Fourth Amendment analysis (*see* Pet.4a-7a, 243 F.3d at 161-63. Similarly, in two succeeding sentences in the same paragraph on page 7 of the brief in opposition, the respondents refer alternatively to "constitutional analysis" and "qualified immunity" as if they were synonymous (*see* Opp.7).

[6] In any event, given that the lower courts here did not have the benefit of *Saucier*, and that the court of appeals' opinion below fails even to consider the summary judgment posture of the case (*see* Pet.10-11, 1a-13a), if certiorari is not granted, then the decision below should be vacated summarily and remanded for further consideration in light of *Saucier*.

resulting in the intentional killing of an innocent person by the police.

Saucier involved a trivial example of an excessive force case, in which a "gratuitous shove" during an otherwise lawful arrest was alleged to constitute excessive force, *see* 121 S. Ct. 2159-60. The majority opinion's rationale for retaining a qualified immunity inquiry separate from the Fourth Amendment analysis was that there could be ambiguity in the content of the legal standard of reasonable force, *see Saucier*, 121 S. Ct. at 2156-59.

As now applied to the very different facts of this case, the narrowed question here is whether there can ever be *legal* ambiguity–not disputes on facts–as to the Fourth Amendment standard governing the use of *deadly* force. We submit that no such ambiguity should ever exist in the constitutional law of the United States, and that this Court's obligation is to insure that no such ambiguity exists. And yet, as was shown by the Petition–and not refuted by the brief in opposition–there currently are ambiguities in the application of the Fourth Amendment's "totality of the circumstances" test in cases of deadly force, which are the subject of ongoing divisions of authority among the courts of appeals (*see* Pet.14-17).

More fundamentally, there is a deficiency in this Court's previous decisions to provide specific guidance to the lower courts on the constitutional standard governing deadly force. Like *Saucier*, *Graham v. Connor*, 490 U.S. 386 (1989), was a generic excessive force case involving a "push or shove," *id.* at 396. The last time that this Court addressed deadly force under the Fourth Amendment was *Tennessee v. Garner*, 471 U.S. 1 (1985). While that decision provides a useful statement of principles, it fails to specify a test for the Fourth Amendment analysis of deadly force beyond "reasonableness." That test is not sufficiently precise to provide meaningful guidance to the courts, or to the police, in the important class of cases involving killings by the police, especially when the wrong person is killed.

The immediate context of *Garner* was the question whether deadly force could be used to prevent escape by fleeing felony suspects. This Court held that, under the Fourth Amendment, "[a] police officer may not seize an unarmed, nondangerous suspect by shooting him dead." 471 U.S. at 11. This holding was supplemented by the following passage, which appears to be dictum in the context of the *Garner* facts:

> "Where the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others, it is not constitutionally unreasonable to prevent escape by the use of deadly force. Thus, if the suspect threatens the officer with a weapon or there is probable cause to believe that he has committed a crime involving the infliction or threatened infliction of serious physical harm, deadly force may be used if necessary to prevent escape, and if, where feasible, some warning has been given."

Id. at 11-12. We think it obvious that this passage, even if treated as authoritative, is woefully inadequate to the task of providing guidance to the lower courts in applying the Fourth Amendment to the range of instances where the police employ deadly force, many of which do not involve the *Garner* context of escape. Furthermore, the use in this passage of a "probable cause" formulation creates confusion, as it did in the courts below in this case,[7] as to whether there is such a thing as doctrine of "probable cause" to kill.

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[7] Even now, respondents continue to argue their case on the basis that the officers had "probable cause" to kill anyone on the scene (*see* Opp.2).

The correct principle to apply is one that is referred to only in passing within the discussion in *Garner*, and that principle is necessity. As in all other cases of allegedly justified homicide in our law, the use of deadly force by the police can only be "reasonable" under the Fourth Amendment where it is necessary to avoid a greater evil. This Court needs to state that principle, clearly and unambiguously, and apply it to a case, such as this one, involving the killing of an innocent and unarmed person.

Surely, this Court does not wish to see *Saucier* applied so as to produce decisions by the lower courts immunizing killings of the innocent by police on the grounds of ambiguity in the constitutional law applicable to the use of deadly force. That would not be the responsible course of action, especially where an appropriate decisional vehicle for the needed guidance is now at hand. At least that way, the lives of future innocent victims such as Mark Milstead might be saved.

4. The intentional taking of an innocent human life through a violent act committed by an officer of the law is an event that deserves the careful attention of this Court under the Fourth Amendment. Officer Kibler's shooting of Mark Mistead was not an accident. Officer Kibler intended to kill a human being, and he did kill a human being. In fact, the person killed was innocent, unarmed, and non-threatening. The defense is "mistaken identity" - that Kibler failed to recognize Milstead as the obviously non-threatening person that both Kibler and Proctor had seen less than one minute beforehand, and that defense raises serious questions of Kibler's credibility and competence. It also identifies factual disputes concerning what Kibler actually saw and did and whether Kibler or anyone else was in any imminent danger, or reasonably could have believed so. The decision below chose to ignore those issues, and thereby prevent their full development upon a trial, by ruling as a matter of law that Kibler was entitled to kill Milstead under the Fourth Amendment, essentially because Kibler was unobservant and panicky. This holding

approximates a ruling as a matter of law that anyone on the scene of a violent crime-including the victim-constitutionally may be killed by frightened police, who are entitled to shoot first and perceive later.

Such a ruling does not reflect an appropriate balance between efficient law enforcement and the preservation of innocent human life. To the contrary, the ruling below retards both of those interests, because it provides a strong disincentive for innocent citizens in distress to seek police assistance. If society's legal system cannot provide at least some degree of assurance that police assistance is likely to be less dangerous to the victim than the crime itself, then what is the point of having police protection at all? In this case, police assistance was more dangerous than the crime, because the inept intervention of the police made matters worse and resulted in the death of the victim.

Furthermore, the ruling below was reached through a series of questionable steps that deepen ongoing conflicts of authority. The court of appeals' premise was that, if Milstead in fact had been Ramey, then he constitutionally could have been killed upon emerging from the door of the house. Even this starting premise appears inconsistent with this Court's holding in *Garner*, as the shooting officer neither perceived a threatening act nor claimed that he was attempting to prevent an escape. But there is a further leap from that premise to the conclusion that Milstead also could be killed. This was based in the court below on an analogy to a mistaken-identity arrest,[8] which compounds the confusion between "probable cause" to arrest and constitutional grounds to kill by failing to balance the degree of intrusion against the officer's justification. It is one thing to conduct a non-violent arrest of the wrong person; it is quite a different thing to kill the wrong person without warning or attempting a less violent means of

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[8] The court of appeals cited and relied upon this Court's decision in *Hill v. California*, 401 U.S. 797 (1971), which involved a peaceful arrest, not a killing. (*See* Pet.9a).

restraint. An officer is required to have more justification for a killing than for an arrest, and therefore should be required to be more certain of this target before he pulls the trigger. And yet, the court of appeals' analysis suggests that mistaken arrests and mistaken killings should be treated the same way, which would set back Fourth Amendment law to the pre-*Garner* era.

But even under its point of view, the court of appeals also was required to ignore most of the evidentiary facts in the case in order to rule as a matter of law that the Fourth Amendment was not violated. Unless taken to be a clearly erroneous application of summary judgment law (*see* Point 2, above), the court of appeals' decision necessarily rules that the facts ignored were immaterial as a matter of Fourth Amendment law. That ruling is in conflict with this Court's statement of the "totality of the circumstances" test and deepens the divisions among the lower courts as to the scope of that test (*see* Pet.13-18). Among those facts now declared to be immaterial by the court below were the absence of any threatening action by Milstead prior to the shooting and indeed Milstead's demonstration that he was non-violent by his actions inside the house. As is aptly summarized by the respondents' own argument here, the court of appeals' decision necessarily rests on the view that "[t]he claims that Milstead was unarmed and did not pose a threat of death or grievous bodily harm to any of the defendants, are quite irrelevant for purposes of the constitutional analysis" (Opp.7). That is an accurate characterization of the court of appeals' rationale, but it is not an accurate application of this Court's decision in *Garner*.

The court of appeals' further reliance on putative "perceptions" by Kibler that were at variance from objective reality raises the additional problem of conflict with the purely objective test enunciated by this Court's decision in *Graham* (*see* Pet.18-20). Far from reconciling this inconsistency, the respondents now seem to argue that the Fourth Circuit's corruption of the *Graham* test into one that

renders the "actual facts" immaterial (*see* Opp.9) is a faithful application of *Graham*. If that interpretation spreads elsewhere, then it will constitutionalize killings of the innocent even where police officers' "perceptions" of threats exist only in their own imaginations.

Thus, the court of appeals decision is not merely wrong and in conflict with other circuits' authority. It also is dangerous to the physical safety of citizens, because it provides too little incentive for the police to distinguish between victims and criminals in the application of deadly force, and too little incentive for officers to distinguish reality from fantasy before discharging their deadly weapons at a human being.

CONCLUSION

For the reasons stated above and in the Petition, a writ of certiorari should issue to review the judgment of the Court of Appeals for the Fourth Circuit. In the alternative, the decision below should be vacated and the case remanded for further consideration in light of this Court's decision in *Saucier v. Katz*, 531 U.S. 991, 121 S. Ct. 2151 (2001).

Respectfully submitted,

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